

Attachment A

**IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

CELLCO PARTNERSHIP d/b/a
VERIZON WIRELESS

Petitioner,

v.

THE FEDERAL COMMUNICATIONS
COMMISSION and the UNITED STATES

Respondents.

No. _____

**DECLARATION OF RICHARD J. LYNCH
IN SUPPORT OF
VERIZON WIRELESS'S REQUEST FOR EXPEDITED REVIEW**

Richard J. Lynch declares:

1. I am employed as Executive Vice President & Chief Technology Officer of Cellco Partnership, d/b/a Verizon Wireless ("Verizon Wireless"). I am responsible for the performance of the company's coast-to-coast multibillion-dollar wireless voice and data network covering more than two million square-miles.

2. The purpose of my declaration is to describe some of the steps Verizon Wireless is being forced to take to increase capacity in lieu of using the spectrum currently licensed to NextWave Personal Communications, Inc. and certain of its affiliates and to Urban Communicators PCS Limited Partnership (collectively

"NextWave spectrum") that Verizon Wireless would have received had the FCC delivered the NextWave spectrum promptly after the close of Auction No. 35. I understand that the FCC takes the position that Verizon Wireless remains obligated to take delivery of the NextWave spectrum at some unspecified future date, if the FCC ever gets the spectrum back. As described below, Verizon Wireless continues to make alternative arrangements month by month in lieu of the NextWave spectrum, making expeditious resolution of the FCC's claim increasingly important, both to ameliorate future ongoing unnecessary expenditures by Verizon Wireless to meet spectrum needs and to enable Verizon Wireless to plan the most economical and efficient means of servicing its customers.

3. Verizon Wireless bid for spectrum licenses in Auction No. 35 both to increase the amount of spectrum it held in certain areas where it already provides service and to acquire new spectrum in areas where it does not provide service on its own network. Verizon Wireless sought to acquire additional spectrum in its existing service areas in order to address capacity constraints in many of its larger and more densely-populated service areas. These constraints increase the difficulty for Verizon Wireless both to serve and to plan to serve the growing demand of its existing subscribers, to accommodate new customers, and to plan for new wireless services, particularly data services. Verizon Wireless sought to acquire spectrum in areas where it did not already hold licenses in order to extend its network into those areas, thus eliminating the need to engage the services of other carriers through costly roaming arrangements.

4. I have been advised that even if the courts ultimately rule in the FCC's favor, the FCC will likely not be able to issue the licenses covered by the NextWave

spectrum to Verizon Wireless until the end of the first quarter of 2004 at the earliest. Verizon Wireless does not have the luxury of time when it comes to addressing and planning for capacity problems, since the incidence of blocked calls—and subscriber dissatisfaction—accelerates dramatically as absolute capacity is reached in a given area. Thus, the FCC's failure to tender the NextWave spectrum to Verizon Wireless has already forced the company to substitute costly technological efforts, including "cell splitting" and the deployment of "smart" antennas, in lieu of spectrum acquisition as a means of alleviating capacity constraints.

5. A "cell" is the geographic area served by a wireless base station. The number of users that can be accommodated within a given amount of spectrum in an area can be increased through splitting an existing cell into smaller cells. By deploying a network that has a higher density of base stations, the frequencies can be re-used more times in a market, and an overall larger number of subscriber calls can be handled simultaneously. Splitting a cell takes approximately 18-24 months. When it became apparent in June 2001 that the FCC would be unable to tender the NextWave licenses in a timely manner, Verizon immediately started the process of splitting more than 800 cells to provide additional capacity. By substituting cell splitting (and the other measures described below) for additional spectrum, Verizon Wireless was able to reduce its need for the NextWave spectrum to increase capacity, at least for the near term.

6. Verizon Wireless could not economically reverse this substitution process if the NextWave spectrum were suddenly to become available: cell-splitting is a laborious process that requires Verizon Wireless to secure land-use approvals, enter into site lease agreements, and deploy radio transceivers designed for use in its existing,

licensed spectrum. The majority of the cost for splitting a cell, once incurred, is sunk: site acquisition costs are irretrievable; site lease agreements typically commit Verizon Wireless for periods of at least 5 years; and transceivers are not convertible from Verizon Wireless's existing frequencies to the frequencies that make up the NextWave spectrum. To date, Verizon Wireless has spent approximately \$75 million to begin the cell-splitting process and anticipates spending more than \$500 million more through the first quarter of 2004 to provide some of the capacity that the NextWave spectrum would have provided.

7. Verizon Wireless is also addressing the loss of the NextWave spectrum in some capacity-constrained areas by deploying so-called "smart" antennas, which use spectrum more efficiently than existing equipment. These antennas are substantially more expensive than the equipment the company would have used had the FCC tendered the NextWave spectrum on schedule. To date, Verizon Wireless has spent approximately \$4 million for field trials to evaluate capacity gains that can be realized by using smart antennas. If these trials are successful, Verizon Wireless will deploy many of these antennas at substantial additional cost to address capacity constraints. If the trials are not successful—that is, if the smart antennas do not provide sufficient capacity gains—the company will have to split significantly more cells.

8. In addition to addressing capacity problems, Verizon Wireless intended to use the NextWave spectrum to fill gaps in the company's existing coverage in 21 service areas. Verizon Wireless currently provides coverage to its customers in some of these areas through "roaming" arrangements with other carriers. Under these arrangements, the other carrier will carry a Verizon Wireless customer's call and then bill Verizon Wireless for the usage. In the vast majority of cases each minute used by a Verizon Wireless national rate plan subscriber when "roaming" on another carrier's network generates higher expenses compared to the expenses generated on a Verizon Wireless-owned network. The FCC's failure to deliver the licenses has required Verizon Wireless to continue to provide out-of-region service through these costly roaming arrangements.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on April 16, 2002.


RICHARD J. LYNCH

Attachment B

**THE ECONOMIC BENEFITS OF PERMITTING
WINNING BIDDERS TO OPT OUT OF AUCTION 35**

J. GREGORY SIDAK[†]

August 26, 2002

[†] F.K. Weyerhaeuser Fellow in Law and Economics Emeritus, American Enterprise Institute for Public Policy Research; Chief Executive Officer, Criterion Economics, L.L.C. This report was prepared for Verizon Wireless. The opinions expressed here are the author's and not those of American Enterprise Institute, which takes no institutional position on specific regulatory matters.

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EXECUTIVE SUMMARY

The FCC's conduct regarding Auction 35 is stifling the economic recovery of the struggling wireless industry. Between the end of Auction 35 in January 2001 and July 2002, the major wireless service providers and equipment manufacturers with operations in the United States lost over \$850 billion, or 65 percent, in market value. Small and mid-sized companies were not spared, as the market capitalization of the suppliers of tower sites and equipment fell by 90 percent, and rural wireless carriers fell almost 84 percent. During that same time period, the telecommunications industry laid off nearly a quarter of a million workers. Making matters worse is the Auction 35 debt that looms over the wireless carriers. The winning bidders from

Auction 35 must treat their obligations as contingent liabilities without deriving any benefit from the underlying asset. Those contingent liabilities have raised the carriers' costs of capital, impaired credit ratings, and prompted investment bankers to conclude that Auction 35 has increased uncertainty in the wireless industry.

The FCC's policy on Auction 35 is harming the U.S. economy. Fortunately a solution exists. The wireless industry would benefit from an economic stimulus. Permitting bidders to opt out of their bids in the FCC's Auction 35 would provide such a stimulus to both the wireless industry and the economy.

Since January 26, 2001, when Auction 35 ended, the FCC has indirectly frozen \$16 billion of investment capital for spectrum licenses that it cannot deliver until 2005, if ever. The FCC refunded most of the bid deposits, but the Commission stated that it would not allow bidders to opt out of Auction 35, hoping that it can reclaim the spectrum through litigation. The bidders therefore treat their Auction 35 bids as contingent liabilities, and their costs of procuring capital have risen.

Allowing bidders to opt out of Auction 35 would allow them to accelerate and redirect valuable capital into the wireless industry. Wireless carriers would invest in infrastructure to expand capacity on their current systems. This spending would directly benefit equipment manufacturers and create new jobs. The creation of new jobs in the wireless equipment industry would slow or reverse the trend of layoffs of the wireless equipment manufacturers.¹ The wireless carriers would also invest in future spectrum auctions, because they require new

1. See, e.g., Rebecca Blumenstein, *For Telecom Workers, Burst Of Bubble Takes Heavy Toll*, WALL ST. J., Aug. 19, 2002, at A1 (stating that since the end of 2000 over 500,000 workers in the telecommunications industry have been laid off). According to the Bureau of Economic Analysis, a \$1 billion increase in the demand for communications equipment would create 19,000 new jobs. See BUREAU OF ECONOMIC ANALYSIS, RIMS II

spectrum to provide new services. Such spectrum could be purchased at future auctions, for example an auction for the 90 MHz of spectrum in the 1710-1755 and 2110-2170 bands or the 700 MHz auction, which was awaiting rescheduling as of the end of July 2002.² After procuring additional spectrum, these carriers would spend billions to build out the spectrum, further increasing economic activity in both the industry and the entire economy. The combined effects of this additional spending would be to increase U.S. GDP by between \$19 billion and \$52 billion, \$12 billion to \$38 billion of which would occur by the end of 2005 versus waiting until after 2005 and getting the delayed benefits of Auction 35, if at all.

Economic harm will occur if the FCC does not allow bidders to withdraw their Auction 35 bids. By refusing to relieve bidders of their commitments when the agency cannot deliver the licenses, the FCC is adding uncertainty to the market for auctioned spectrum, and market for secondary spectrum. Bidders will discount their bids in future auctions to account for the chance that they will not receive the spectrum in a timely manner. Consequently, proceeds from future spectrum auctions will decline because a license will be less valuable, regardless of the form of auction in which it is sold. The uncertainty of the delivery of the Auction 35 licenses will reduce the volume of spectrum sold on the secondary market. A wireless carrier would be willing to pay less for a given amount of spectrum today if it was certain that it would acquire the Auction 35 spectrum in the future. Consequently, wireless carriers will reduce their current demands for spectrum sold on the secondary market. Also, if the FCC proceeds with any spectrum auction

REGIONAL MULTIPLIER DATA FOR THE UNITED STATES at Table 1.4, June 2002 [hereinafter BUREAU OF ECONOMIC ANALYSIS, REGIONAL MULTIPLIER DATA].

2. Auction of Licenses for 747-762 and 777-792 MHz Bands (Auction 31) Is Rescheduled, FCC Public Notice, DA 02-1829 (July 26, 2002) [hereinafter Upper 700 MHz Band Rescheduling Notice]; NATIONAL TELECOMMUNICATIONS AND INFORMATION ADMINISTRATION, AN ASSESSMENT OF THE VIABILITY OF ACCOMMODATING ADVANCED MOBILE WIRELESS (3G) SYSTEMS IN THE 1710-1770 MHz AND 2110-2170 MHz BANDS (released July 22, 2002) [hereinafter NTIA SPECTRUM REPORT].

while \$16 billion of potential investment capital is frozen, the increased cost of capital from this debt burden would prevent wireless carriers from bidding as intensely (or at all), reducing proceeds of future auctions.

Relieving bidders of their Auction 35 liabilities will stimulate the economy and alleviate the drag on its growth. The FCC should allow bidders to withdraw their Auction 35 bids.

INTRODUCTION

Between January 2001 and July 2002, the market capitalization of telecommunications firms with large wireless divisions and wireless equipment manufacturers fell by more than \$850 billion. By July 2002 the stock prices of AT&T Wireless and Sprint PCS fell to all-time lows. Over the same period, wireless service providers and wireless equipment manufacturers laid off nearly a quarter of a million workers. Credit downgrades for wireless service providers (Sprint PCS, Nextel, and Cingular) and wireless equipment manufacturers (Nortel, Lucent, Ericsson, and Motorola) now constrict the industry's access to capital.

The Federal Communications Commission's (FCC's) current policy on Auction 35 is exacerbating the sharp downturn in the wireless industry. While the licenses were still in bankruptcy, the FCC auctioned the same licenses for a second time, in December 2000, when the price of spectrum was much higher. Bidding in the auction ended in late January 2001. In June 2001, before the FCC delivered the licenses to the carriers that had submitted winning bids in the reauction, the U.S. Court of Appeals for the D.C. Circuit ruled that bankruptcy law precluded the FCC's reauction of the spectrum, sending the spectrum back to NextWave.³ After settlement efforts failed, the FCC refused to cancel the reauction results, even though it had no spectrum to

give the winners. The bankruptcy case is now in the Supreme Court, with a decision not likely until 2003. But because the Auction 35 licenses were never delivered, the winning bidders effectively acquired large liabilities with no offsetting assets. Even if the FCC wins in the Supreme Court in 2003, further rounds of litigation will doubtless begin, with ultimate resolution in perhaps 2005 or even later. At that point, even if the FCC can ultimately reclaim the disputed spectrum, it could try to force the winning bidders to pay \$16 billion within ten business days.

In this report, I examine the economic costs and benefits of the FCC's current policy toward Auction 35. The only conceivable benefit from the FCC's effort to hold bidders to their bids is the hope that the Treasury would collect the \$16 billion of winning bids in 2005, at the earliest. The costs of that policy, however, are severe. Not only does the FCC's policy harm wireless service providers and equipment manufacturers, it also harms taxpayers by lowering future auction receipts to the U.S. Treasury. By the time that the Treasury receives the Auction 35 proceeds in 2005 (assuming that the FCC prevails in all litigation concerning the reauction), growth in the U.S. wireless industry may have stagnated for three more years. The secondary market for spectrum also may be disrupted until that time. Finally, the FCC's actions undermine the integrity of the auction process. By asserting that it owes no contractual obligation to deliver spectrum to winning bidders in a timely manner, the FCC increases uncertainty in the auction process and will cause future bidders to discount their bids or avoid auctions altogether. Because the costs of pursuing its current policy are considerable, the FCC should allow the winning bidders in the reauction to withdraw their bids.

3. NextWave Personal Communications, Inc. v. FCC, 254 F.3d 130 (D.C. Cir. 2001).

I. THE STATE OF THE U.S. WIRELESS INDUSTRY SINCE THE CLOSE OF AUCTION 35

The U.S. wireless industry faces serious obstacles arising from lower subscriber growth for existing voice services,⁴ slow uptake of data services, and particularly by heavy debt that is materially worsened by the \$16 billion Auction 35 liability. Operators of mobile networks abroad invested in third-generation networks with the expectation of earning higher revenues from new data services. Wireless operators in Europe generate as much as 10 percent of their revenues from data services, whereas that figure is thought to be less than 1 percent in the United States.⁵ Still, consumers are sometimes slow to embrace new wireless services. And with the cost of expanding and modifying a sophisticated wireless network reaching well into the billions of dollars, any uncertainty surrounding the potential demand for new wireless services will elicit caution. According to *The Economist*, some investors fear that “mobile telecoms is merely a low-growth utility, rather than an industry on the verge of a new phase of explosive expansion.”⁶ Slackening demand from end users not only has harmed the carriers, but also has triggered a decline in demand for wireless equipment. In May 2002, for example, Ericsson and Motorola announced that each would lay off more than 40,000 workers.⁷ In the following sections, I examine the decline in the wireless services and wireless equipment industries in terms of lost market values, lost jobs, and lower credit ratings.

A. Wireless Service Providers and Wireless Equipment Manufacturers

The close of Auction 35 is an appropriate starting point. This choice is not intended to suggest that the FCC’s role in conducting Auction 35 is responsible for all of the wireless

4. *Wireless Wreck on Wall Street*, RCR WIRELESS NEWS, June 17, 2002, at 1.

5. *Inside Track—America Finally Gets the Message*, FIN. TIMES, June 11, 2002, at 18 [hereinafter *Inside Track*].

6. *No End in Sight: The Telecoms Slump*, THE ECONOMIST, May 4, 2002, at *1.

7. *Id.*

industry's ailments. Rather, the choice highlights the extent to which the industry has declined over such a short period in time.

1. Market Capitalization

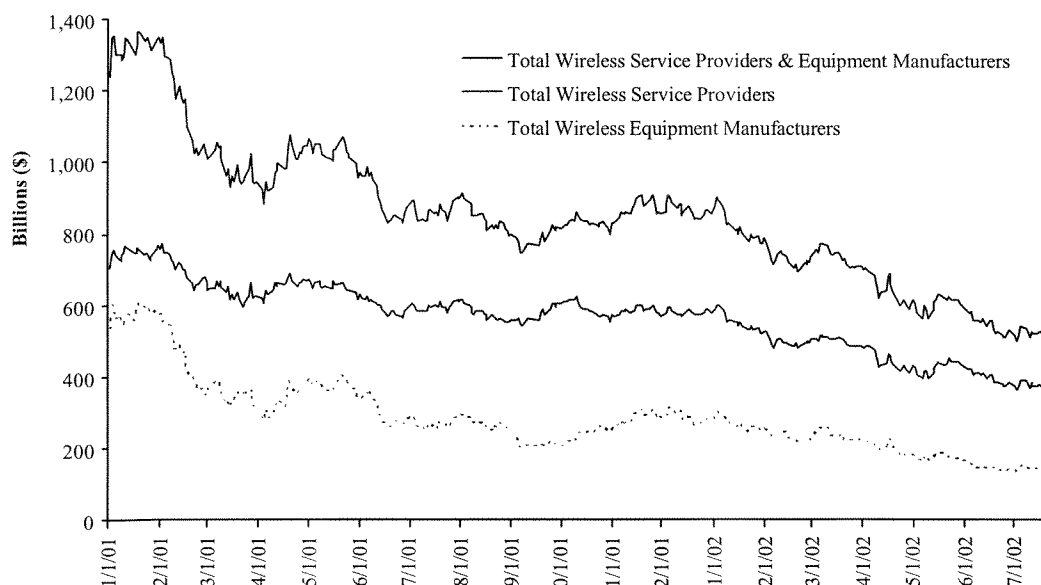
A common indicator of an industry's health is market capitalization. A firm's market capitalization (or market value) equals the firm's share price multiplied by the number of shares outstanding. A firm's share price is the market's expectation of the present discounted value of the firm's expected net cash flows. Declining stock prices indicate a decline in the market's expectation of the firm's future net cash flows.

To gauge the health of the wireless industry, I created a composite index of major wireless service providers and wireless equipment vendors that operate in the United States. The major telecommunications companies with wireless service operations in the United States (along with their stock symbols) are AT&T Wireless (AWE), BellSouth (BLS), SBC (SBC), SprintPCS Group (PCS), Verizon Communications (VZ), Nextel (NXTL), and Vodafone Group (VOD).⁸ The major communications equipment vendors that sell wireless equipment in the United States are Ericsson (ERICY), Lucent Technologies (LU), Motorola (MOT), Nokia (NOK), Qualcomm (QCOM), and Nortel Networks (NT). Figure 1 shows the market capitalization of the major wireless service providers and wireless equipment vendors from the close of Auction 35 on January 26, 2001 until July 22, 2002.⁹

8. BellSouth and SBC operate a wireless joint venture under the name Cingular. Because Cingular does not have a tracking stock, I use the stock price of the two parent companies. I exclude VoiceStream because it is wholly owned by Deutsche Telekom, whose revenues principally come from outside the United States.

9. Stock prices were downloaded from Standard & Poor's Research Insight and from Yahoo's web site at (<http://finance.yahoo.com>). Most of the large wireless service providers are divisions of telecommunications companies that provide telecommunications services other than wireless. For example, Bell South and SBC own Cingular, while Verizon and Vodafone own Verizon Wireless. Similarly, the wireless equipment manufacturers produce some telecommunications devices that are unrelated to the wireless industry. The consolidated financial information for these companies may cause my analysis below to overstate the decline in the *wireless* industry. In

FIGURE 1: MARKET CAPITALIZATION OF WIRELESS SERVICE PROVIDERS AND WIRELESS EQUIPMENT MANUFACTURERS SINCE THE CLOSE OF AUCTION 35



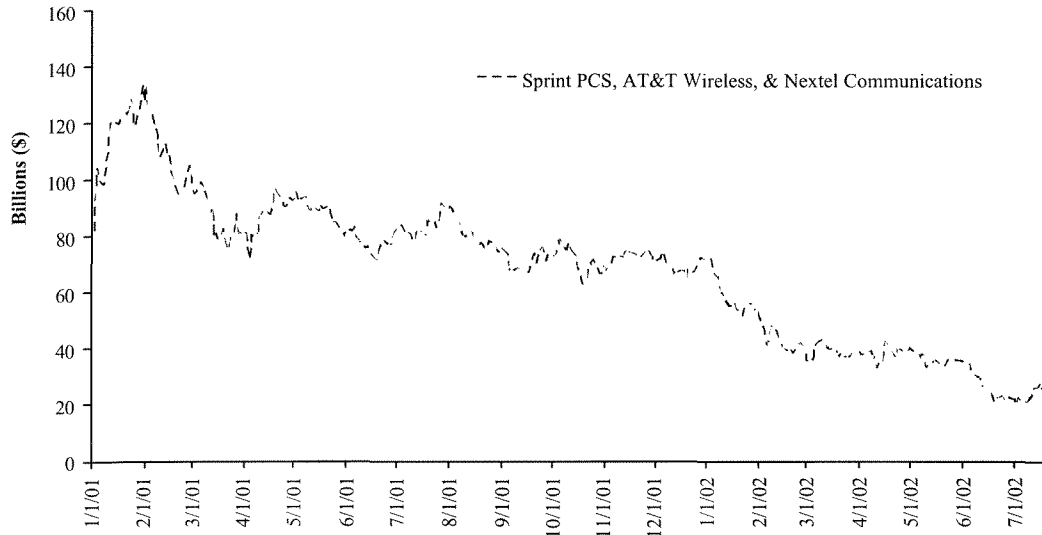
Sources: Standard & Poor's Research Insight; Yahoo!Finance at www.yahoo.com.

As Figure 1 shows, the market capitalization of companies with large wireless service divisions declined from a high of \$772 billion on February 1, 2001 to a low of \$321 billion on July 22, 2002—a decline of 58.4 percent. The wireless equipment vendors' values also fell precipitously. Their combined market capitalization declined from a high of \$608 billion on January 19, 2001 to a low of \$134 billion on July 22, 2002—a decline of 78.0 percent.

Figure 2 shows the market capitalization of just Sprint PCS, AT&T Wireless, and Nextel Communications for the same period.

particular, a slowdown in a telecommunications industry other than the wireless industry could have caused part of the market value decline and worker layoffs that these multiproduct firms suffered.

FIGURE 2: MARKET CAPITALIZATION OF SPRINT PCS, AT&T WIRELESS, AND NEXTEL COMMUNICATIONS SINCE THE CLOSE OF AUCTION 35



Sources: Standard & Poor's Research Insight; Yahoo!Finance at www.yahoo.com.

The market capitalization for these national wireless-only carriers has fallen from a post-Auction 35 high of \$133.6 billion on January 30, 2001, to a low of \$20 billion on July 2, 2002—a decline of 85 percent.

Big companies were not the only ones hurt by the decline in the wireless industry. Small and mid-sized companies also suffered huge equity losses. Both the tower companies¹⁰ and rural wireless carriers were hurt by the decline of the wireless industry. The publicly traded wireless

10. "Tower companies" includes tower operators and tower-site manufacturers. Tower operators own, lease, and manage rooftop sites and tower sites on behalf of wireless communication providers and broadcast companies. Three leading tower operators are Crown Castle International, American Tower, and SpectraSite Holdings, Inc. See CROWN CASTLE INTERNATIONAL CORP., 2001 SEC FORM 10-K at 1 (released Apr. 1, 2002); AMERICAN TOWER CORP., 2001 SEC FORM 10-K at 2 (released Apr. 1, 2002); SPECTRASITE HOLDINGS, INC., 2001 SEC FORM 10-K at 1 (released Mar. 20, 2002). Tower-site manufacturers build and install tower structures. They also build equipment enclosures that are installed at the tower. ROHN Industries is the major tower-site manufacturer in the United States. See ROHN INDUSTRIES INC., 2001 SEC FORM 10-K at 2 (released Apr. 2, 2002).

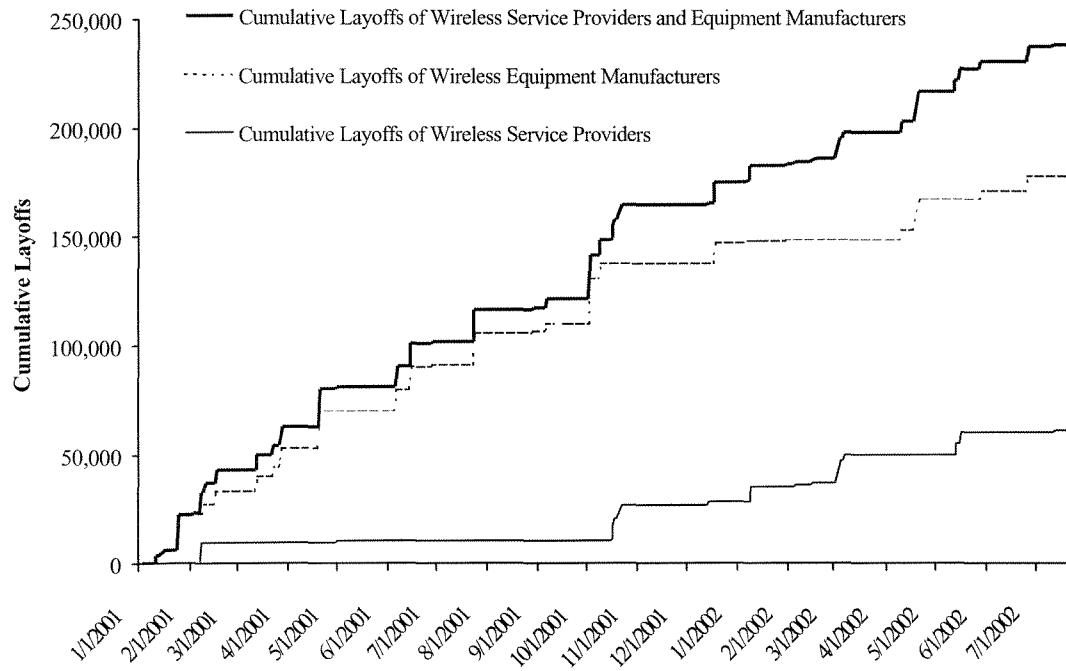
tower companies lost 92.5 percent of their combined market capitalization between January 26, 2001 and July 22, 2002, while rural wireless carriers lost 84 percent of their combined market capitalization during that time.

2. Wireless Employment

This destruction of hundreds of billions of dollars of market capitalization accompanied the elimination of hundreds of thousands of jobs for telecommunications service providers and equipment manufacturers with large wireless divisions. Figure 3 shows the cumulative layoffs of these telecommunications providers and telecommunications equipment manufacturers between the close of Auction 35 and July 22, 2002.¹¹

11. For all wireless firms except Vodafone, employment data are from Forbes Layoff Tracker (available on Forbes web site at Forbes.com). Vodafone employment data are from www.transnationale.org.

FIGURE 3: CUMULATIVE LAYOFFS OF WIRELESS SERVICE PROVIDERS
AND WIRELESS EQUIPMENT MANUFACTURERS



Source: Downloaded from Forbes Layoff Tracker at www.forbes.com, and www.transnationale.org.

As Figure 3 shows, the telecommunications equipment manufacturers that are large wireless equipment producers laid off more than 185,000 workers between the end of Auction 35 and the end of July 2002. The telecommunications providers with large wireless divisions laid off more than 61,000 workers during that time. In total, firms with large wireless operations laid off nearly a quarter of a million workers between January 2001 and July 2002. The rapid pace at which those layoffs occurred imposed dislocation costs on the industry, as it seems unlikely that workers could have anticipated how quickly their jobs would vanish.

B. Credit Ratings of Wireless Firms

I now review how the major credit agencies have responded to the wireless industry's problems, and I explain how the winning bidders have interpreted the financial implications of their winning bids in Auction 35.

1. Auction Bids as Contingent Liabilities

The FCC has not acknowledged that the D.C. Circuit's NextWave decision extinguished the winning bidders' obligation to purchase the licenses sold in Auction 35. As noted above, if the FCC can reclaim the disputed spectrum, it can order the winners to pay \$16 billion within ten business days. The FCC will then essentially hold a "put option" over the Auction 35 winning bidders. This option is a shield against a decline in the spectrum's value that the agency can exercise at some indefinite date, years from now. It is impossible for wireless carriers to measure the resulting financial risk using an options pricing model like Black-Scholes, because real-world options markets trade only futures contracts with expiration terms.¹²

The threat of the FCC's put option deters wireless carriers from either dipping into their partially "refunded" bid deposits or seeking other capital sources, thereby retarding capital spending in the wireless industry. Because of this put option, Verizon Wireless in June 2002 reported its Auction 35 commitments as contingent liabilities.¹³ In less formal terms, earlier in 2002, Cingular (\$1.7 billion owed) and AT&T Wireless (\$2.6 billion owed) reported their Auction 35 obligations to be contingent liabilities as well.¹⁴ Regardless of how formally these

12. See, e.g., RICHARD A. BREALEY & STEWART C. MYERS, *PRINCIPLES OF CORPORATE FINANCE* 577 (McGraw-Hill 5th ed. 1996).

13. *Commitments and Contingencies*, VERIZON COMMUNICATIONS INC., 2001 SEC FORM 10-K/A at 37 (released June 3, 2002). A contingent liability is a liability that is listed in a company's financial notes rather than its accounts. See CLYDE P. STICKNEY & ROMAN L. WEIL, *FINANCIAL ACCOUNTING* 482 (Dryden Press 9th ed. 2000).

14. *Management Discussion and Analysis of Financial Conditions and Results of Operations*, AT&T WIRELESS, 2001 ANNUAL REPORT 20 (Mar. 18, 2002) ("To the extent [its wireless affiliated] is not awarded these licenses, we could use these funds for other purposes, including acquisition of spectrum."); *Management Discussion*

contingent liabilities are currently reported in SEC filings, the capital markets are well aware of them and are reducing the carriers' access to funds. In March 2002, for example, Merrill Lynch evaluated for investors a "worst case" scenario in which the Auction 35 winners acquire the liabilities associated with the purchase of an asset, but not the associated rights of use.¹⁵

Those massive contingent liabilities impede the wireless carriers' ability to allocate resources to additional investment activities, such as the acquisition of more spectrum licenses or the development of additional wireless sites. The investment community recognizes the carriers' *de facto* liabilities, and in some cases this recognition has adversely affected interest rates that winning bidders must pay to borrow funds. Thus, the cost of investment for the wireless carriers is higher than if the contingent liabilities from Auction 35 did not exist. With the higher capital costs of wireless investment, there are fewer investment opportunities whose expected rate of return exceeds the cost of capital. Industry growth slows accordingly.

2. Credit Reports and Financial Downgrades since the Close of Auction 35

The major credit reporting agencies have downgraded the wireless companies since the close of Auction 35. A company's credit rating influences its ability to raise additional funds—poor credit ratings increase the cost of borrowing, which limits investment activity. Table 1 summarizes the Moody's credit ratings for each of the major wireless service operators and equipment manufacturers at the end of Auction 35 (January 2001) and in July 2002.

and Analysis of Financial Conditions, SBC COMMUNICATIONS INC., 2001 ANNUAL REPORT 20 (Feb. 8, 2002) ("If all the licenses are awarded, it is estimated Cingular would be required to provide [its wireless affiliate] approximately \$1.7 billion.").

15. Merrill Lynch Capital Markets, Wireless Spectrum: NextWave—Waiting for the Supreme Court, Investtext Report at 1 (Mar. 1, 2002).

TABLE 1: MOODY'S CREDIT RATINGS OF WIRELESS SERVICE PROVIDERS
AND WIRELESS EQUIPMENT MANUFACTURERS

	January 26, 2001		July 26, 2002		Note
Company	Long-Term Debt Rating	Outlook	Long-Term Debt Rating	Outlook	Upgrade, Downgrade, or Same
Wireless Equipment Manufacturers					
Ericsson	A1	Negative	Ba1	Negative	Downgrade
Lucent Technologies, Inc.	Baa1		B2	Negative	Downgrade
Motorola, Inc.	A1	Negative	Baa2	Negative	Downgrade
Nokia	A1	Positive	A1	Negative	Same
Nortel Networks Limited	A2	Stable	Ba3	Negative	Downgrade
Qualcomm ^a	NA	NA	NA	NA	NA
Wireless Service Providers					
AT&T Wireless Services, Inc.	Baa2*		Baa2	Negative	Same
Cingular Wireless LLC	A2	Stable	A3	Negative	Downgrade
Nextel Communications	B1		B3	Negative	Downgrade
Sprint Corp.	Baa1	Negative	Baa3	Negative	Downgrade
Verizon Communications, Inc.	A1	Stable	A1	Negative	Same
Vodafone Group Plc	A2	Stable	A2	Stable	Same
VoiceStream Wireless Corp.	B2		Baa2	Negative	Upgrade

Notes: Moody's issued its initial credit rating for AT&T Wireless on February 15, 2002.

Source: Downloaded from Moody's Credit Rating at <http://www.moodys.com/cust/watchlist/watchlist.asp?busLineName=North+America>. (a) Qualcomm does not have a long-term debt rating on Moody's. According to Standard & Poor's, Qualcomm has reported zero debt since the second quarter of 2000. Standard & Poor's Research Insight v. 7.8 (downloaded July 30, 2002).

As Table 1 shows, Moody's downgraded nearly all the wireless equipment manufacturers over the sample period. On July 26, 2002, Moody's downgraded Ericsson's long-term debt to "Ba1," which classifies Ericsson's debt as "junk."¹⁶ On August 2, 2002, Standard & Poor's also downgraded Ericsson's long-term debt to junk status.¹⁷ Of the wireless service providers, AT&T Wireless, Cingular, Sprint PCS, Verizon, and VoiceStream received negative outlooks (although VoiceStream received a credit rating upgrade). These credit downgrades increase the carriers' cost of borrowing, as lenders require a higher rate of return to compensate for the increased risk

16. See *Moody's Downgrades Ericsson L-T Debt To Ba1*, D.J. NEWSWIRE, July 26, 2002.

17. See *S&P Cuts Ericsson's Debt Rating to Junk Status*, L.A. TIMES, August 2, 2002, at C4.

of default.¹⁸ As the cost of capital increases, marginal investment projects become unprofitable and are therefore abandoned. The associated decrease in investment impedes the wireless industry's efforts to relieve congestion in all service areas and to supply new services.

Even more harmful to consumer welfare is the prospect that carriers may postpone the move to new wireless services. Greater uncertainty surrounds the future demand for a new service than the demand for an existing one.¹⁹ Consequently, the cost of financing investment in a new service is likely higher, so as to compensate the investor for the increased risk. But if they succeed, new services have great payoffs for the first entrants into the new market, and such services can greatly accelerate revenue growth. Thus, the increased cost of capital for some wireless carriers could squeeze out investment for the very services that may drive the industry's growth.

The investment community has voiced these concerns. Research analysts have interpreted the events related to Auction 35 as "bad news" for the wireless carriers. According to Merrill Lynch, the Supreme Court injected "more delay and uncertainty" into the wireless industry by accepting the FCC's petition for a writ of certiorari in the NextWave case.²⁰ Lehman Brothers stated that the effect of the delay "falls disproportionately on the carriers"²¹ and imposes costs on them:

Without the benefit of these licenses and better technology, the only other way for a carrier to increase capacity is by the expensive process of cell-splitting. We may have

18. See, e.g., ROBERT S. PINDYCK & DANIEL L. RUBINFELD, MICROECONOMICS 552-54 (Prentice Hall 4th ed. 1998).

19. See, e.g., Jerry Hausman & J. Gregory Sidak, *A Consumer-Welfare Approach to the Mandatory Unbundling of Telecommunications Networks*, 109 YALE L.J. 417, 458-60 (1999) (discussing investment incentives under uncertainty); Jerry A. Hausman, *Valuing the Effect of Regulation on New Services in Telecommunications*, 1997 BROOKINGS PAPERS ON ECONOMIC ACTIVITY: MICROECONOMICS 1, 43 [hereafter Hausman, *Valuing the Effect*].

20. Merrill Lynch Capital Markets, *supra* note 15, at 2.

21. Lehman Brothers Inc., Supreme Court Agrees to Hear NextWave Case, Investext Report at 1 (Mar. 5, 2002).

already seen signs of this at Verizon Wireless during 4Q01. During 2001, Verizon Communications stated numerous times that Verizon Wireless would incur capital expenditures of \$4.6 billion for the year. When it came time to report 4Q01 results, Verizon had actually spent \$5.0 billion during 2001. If the carriers do not receive the licenses until sometime in 2003, it is likely they will have to continue to split cells in order to just *maintain* network quality and capacity.²²

Lehman Brothers reasoned that “delay in the award of the licenses obviously translates into a delay in buildout, which [adversely] affects the tower companies.”²³ By increasing the appearance of volatility and risk facing the wireless industry, these equity research reports further increase the carriers’ cost of capital.

3. The Harm to Small and Mid-Sized Firms in the Wireless Industry

The tower companies and the rural wireless carriers also lost market value between the end of Auction 35 and July 22, 2002. The major tower companies—American Tower (AMT), Crown Castle International (CCI), SpectraSite Holdings (SITE), and ROHN Industries (ROHN)—had a combined market capitalization of \$15.9 billion on January 26, 2001. By July 22, 2002, the combined market capitalization of those firms had fallen to \$1.2 billion—a decline of 92.5 percent. In addition, the market capitalization of the rural wireless carriers—Airgate PCS (PCSA), Dobson Communications (DCEL), Leap Wireless (LWIN), Nextel Partners (NXTP), Rural Cellular (RCCC), Triton PCS Holdings (TPC), US Cellular (USM), US Unwired (UNWR), and Western Wireless (WWCA)—fell from \$16.3 billion on January 26, 2001, to \$2.6 billion on June 22, 2002—a decrease of 83.9 percent.

On November 9, 2001 and again on May 17, 2002, Moody’s downgraded tower operators’ credit ratings²⁴ and flagged three rural wireless carriers with negative industry

22. *Id.* at 3 (emphasis added).

23. *Id.* at 4.

24. American Tower was downgraded on November 9, 2001, and SpectraSite Holdings (under the name SpectraSite Communications) was downgraded on May 17, 2002. See *S&P Lowers American Tower Corp. Credit To B+ From BB-*, D. J. NEWSWIRE, Nov. 9, 2001 [hereinafter *S&P Lowers American Tower*]; *S&P: SpectraSite*

outlooks.²⁵ Since Auction 35 ended, American Tower and SpectraSite Holdings have been downgraded, while Crown Castle has a negative industry outlook according to Moody's. Rural wireless carriers have fared better, as only Western Wireless was downgraded. Still, Nextel Partners, US Cellular, and US Unwired have negative outlooks.

Credit constraints on the large wireless firms will harm further the small and mid-sized firms in the wireless industry. Analysts have stated that the delay in deployment of the Auction 35 spectrum has hurt the tower companies.²⁶

The economic impact on rural wireless carriers reflects a spillover effect concerning investment in wireless equipment. These carriers have stated that their own equipment demands are insufficient to induce the equipment manufacturers to produce low-cost devices.²⁷ Rather, rural wireless carriers can only afford equipment that is mass-produced for the larger carriers.²⁸ A reduction in the large wireless carriers' demand for wireless equipment raises rural carriers' costs.²⁹

C. Debt Levels in the Wireless Industry

A graphical analysis of the wireless carriers' debt further highlights how the Auction 35 contingent liabilities harm the wireless industry. Figure 4 and Figure 5 show the effect of the Auction 35 contingent liabilities on two measures of debt relative to firm size: debt to market

Ratings Lowered and Put on Watch, D. J. NEWSWIREs, May 17, 2002 [hereinafter *S&P: SpectraSite Ratings Lowered*]. SpectraSite Communications' capital stock is the only significant asset of SpectraSite Holdings. See SPECTRASITE HOLDINGS, INC., SEC FORM 10-Q at 14 (released May 13, 2002).

25. Nextel Partners, US Cellular Corp., and US Unwired were flagged with negative industry ratings. See *Nextel Partners Outlook Now Neg Vs. Stable By Moody's*, D. J. NEWSWIREs, Nov. 27, 2001; *Moody's Confirms US Unwired; Outlook Cut To Neg. Vs. Stable*, D. J. NEWSWIREs, Feb. 14, 2002; *Moody's Confirms A3 Senior Long-Term Debt Rating of US Cellular and TDS; Outlooks Changed From Stable To Negative*, MOODY'S INV. SERV., May 10, 2002.

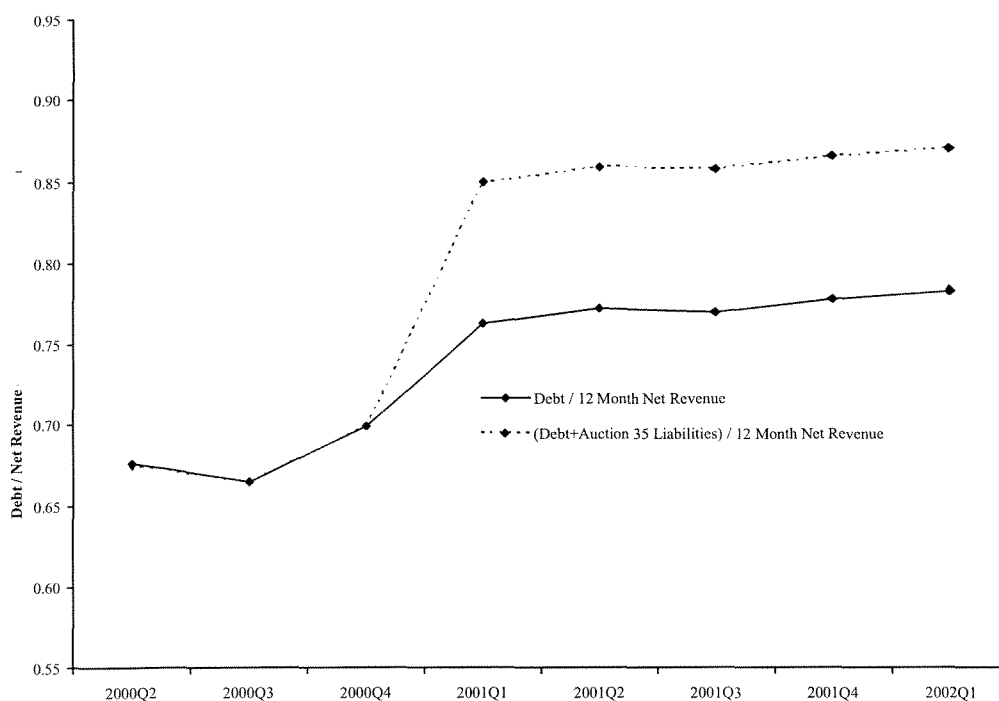
26. Lehman Brothers, *supra* note 21, at 4.

27. See Comments of the Rural Telecommunications Group, Spectrum Policy Task Force Seeks Public Comment on Issues Related to Commission's Spectrum Policies, ET Dkt. No. 02-135 at 8 (filed July 8, 2002).

28. *Id.*

capitalization and debt to revenue. These debt ratios measure the long-term liquidity risk of a company.³⁰ As a company's long-term debt ratios rise, it becomes more likely that the company will default on its outstanding principal and interest payments.³¹

FIGURE 4: THE RATIO OF DEBT TO TWELVE-MONTH REVENUE FOR THE THREE LARGEST BIDDERS IN AUCTION 35



Note: The three largest bidders in Auction 35 were Cellco Partnership, Alaska Native, and Salmon. Verizon Wireless bid as Cellco Partnership, while AT&T Wireless and Cingular were the principal financiers of Alaska Native and Salmon, respectively. Therefore, the three largest bidders in Auction 35 were, in effect, Verizon Wireless, AT&T, and Cingular.

First, consider the effect of the Auction 35 liabilities on the ratio of debt to 12-month revenues for the wireless carriers. Figure 4 depicts this ratio between the second quarter of 2000 and the second quarter of 2002. Before Auction 35, this ratio was between .66 and .68. After Auction 35,

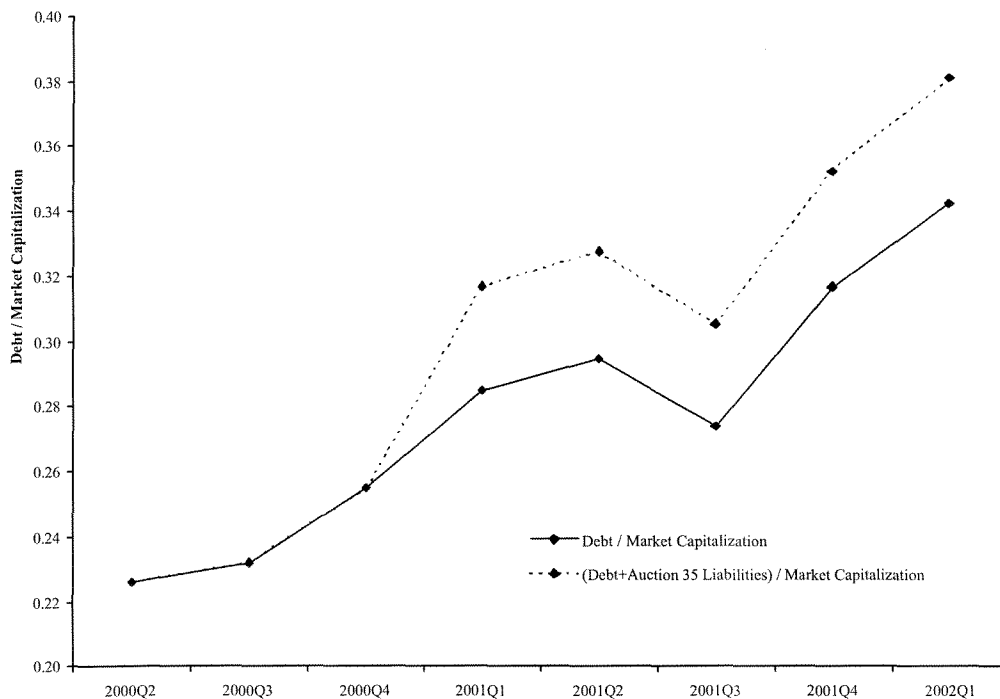
29. *See id.* (stating that mass production caused equipment costs per cell to fall by over \$800,000).

30. *See, e.g.,* STICKNEY & WEIL, *supra* note 13, at 256-59.

31. *Id.* at 256-57.

debt to 12-month revenue jumped to .85 and increased to .87 by the first quarter of 2002. Without the Auction 35 liabilities, debt to 12-month revenue would have been .76 after the first quarter of 2001 and would have increased to .78 by the first quarter of 2002. Thus, the three largest Auction 35 bidders' debt relative to 12-month revenues is roughly 10 percentage points higher than it would be without the Auction 35 contingent liabilities.³²

FIGURE 5: THE RATIO OF DEBT TO MARKET CAPITALIZATION FOR THE THREE LARGEST BIDDERS IN AUCTION 35



Note: The three largest bidders in Auction 35 were Cellco Partnership, Alaska Native, and Salmon. Verizon Wireless bid as Cellco Partnership, while AT&T Wireless and Cingular were the principal financiers of Alaska Native and Salmon, respectively. Therefore, the three largest bidders in Auction 35 were, in effect, Verizon Wireless, AT&T, and Cingular.

32. The three largest bidders in Auction 35 were Cellco Partnership, Alaska Native, and Salmon. Verizon Wireless bid as Cellco Partnership, while AT&T Wireless and Cingular were the principal financiers of Alaska Native and Salmon, respectively. Therefore, the three largest bidders in Auction 35 were, in effect, Verizon Wireless, AT&T, and Cingular.

An analysis of debt to market capitalization yields similar results. Figure 5 shows that before Auction 35, the three largest Auction 35 winners' debts relative to market capitalization ranged from .23 to .25. However, debt relative to market capitalization increased to 32 percent in the first quarter of 2001 due to the Auction 35 contingent liabilities. That ratio has steadily increased to .38 since the end of Auction 35.

If the contingent liabilities from Auction 35 were to become debt, the debt ratios of the mid-sized wireless carriers would also increase. Dobson Communications Corp (DCEL) and Leap Wireless International (LWIN), two publicly traded wireless carriers, won licenses let at Auction 35. Dobson holds \$537 million in contingent liabilities from Auction 35³³ and Leap holds \$350 million in contingent liabilities from Auction 35. Dobson's debt and liabilities at the end of June 2002 were \$1.3 billion.³⁴ If Dobson's Auction 35 contingent liabilities were to become debt, Dobson's debt holdings would increase by 42 percent. Dobson's ratio of debt to market capitalization at the end of the second quarter of 2002 was 16.4. That ratio would rise to 23.2—an increase of 680 percentage points—if Dobson's Auction 35 commitments were to become debt.³⁵ After the second quarter of 2002, Leap reported \$2.4 billion in debt and liabilities.³⁶ If Leap's Auction 35 contingent liabilities were to become debt, then Leap's debt holdings would increase by 15 percent. Also, Leap's ratio of debt to market capitalization would increase from 59.1 to 67.8 if its contingent liabilities from Auction 35 were to become debt.³⁷ An 870 percentage point increase in debt to market capitalization would indicate that Leap would be

33. Dobson was high bidder on \$546 million in licenses, but was awarded three licenses, worth \$9.5 million, from Auction 35. These three licenses were not subject to the FCC's litigation with NextWave. Thus, Dobson's contingent liabilities from Auction 35 are \$537 million.

34. See, DOBSON COMMUNICATIONS CORP., 2002 SEC FORM 10-Q at 10 (released Aug. 14, 2002).

35. Dobson's market capitalization of \$78.1 million on June 28, 2002 was downloaded from Yahoo!Finance at <http://finance.yahoo.com>.

36. See, LEAP WIRELESS INTERNATIONAL, INC., 2002 SEC FORM 10-Q at 3 (released Aug. 14, 2002).

more likely to default on its principal and interest payments. Thus, the FCC's current policy regarding the Auction 35 contingent liabilities places an even greater relative debt burden on the mid-sized wireless carriers than it does on the three largest wireless carriers.

II. SOURCES OF INCREASED GDP FROM ALLOWING BIDDERS TO WITHDRAW THEIR AUCTION 35 BIDS

To what extent might spending by wireless service providers *accelerate* if the FCC permitted the winning bidders to opt out of Auction 35? With billions of dollars of contingent liabilities stricken from their books, the carriers' capital costs would fall by the amount of the current risk premium, and their investment decisions no longer would be constrained by the FCC's inability to deliver the auctioned spectrum. As a result, the carriers would invest in three key areas. First, the carriers would reconfigure their existing networks to relieve congestion, starting with their most strategic and profitable markets. Second, the carriers would invest in future broadband spectrum auctions. Third, if they procured additional spectrum licenses, the carriers would build out new networks or make advances to existing networks to provide new wireless services on the additional bandwidth.

Once these funds were spent, they would have a multiplicative effect on the economy.³⁸ A dollar spent to purchase wireless equipment would in turn be passed, in part, to workers as incremental income. Workers would then spend a portion of that extra income, and other sectors of the economy would benefit as well. Hence, one dollar of investment will increase national

37. Leap's market capitalization of \$40.6 million on June 28, 2002 was downloaded from Yahoo!Finance. *See supra* note 35.

38. The multiplier is a standard principle in the macroeconomics literature. *See, e.g.,* RUDIGER DORNBUSCH & STANLEY FISCHER, *MACROECONOMICS* 66 (McGraw Hill 6th ed. 1994). Richard Kahn first introduced the multiplier concept as an "employment multiplier." *See* Richard F. Kahn, *The Relation of Home Investment To Employment*, 41 *ECON. J.* 173, 173-98 (1931). John Maynard Keynes expanded upon this concept by introducing the "investment

income by more than one dollar.³⁹ The increase in income divided by the increase in investment equals the multiplier.⁴⁰ The following sections consider the incremental impact that this multiplier effect would have on U.S. gross domestic product (GDP).

A. Investment to Relieve Congestion

If a wireless network is congested, a wireless user may be blocked from placing a call, or an already-placed call may become garbled or be dropped. If a wireless service provider's costs of obtaining additional capital were not prohibitively high, the carrier would respond by investing in infrastructure to alleviate the congestion, naturally starting in its most profitable markets. This spending might be modest at first, because relieving congestion by reconfiguring a network to allow for smaller, more densely packed cell sites (a process called "cell splitting") is inferior to combining new equipment with incremental amounts of bandwidth.

The \$16 billion Auction 35 liability raises bidders' borrowing costs for capital, which causes marginal investment projects to be forgone. Freeing bidders from that liability would thus directly result in expanded build out and network investment. With the cost of an additional cell tower at between \$800,000 and \$1 million,⁴¹ it would be reasonable to expect spending in the range of \$500 million to \$3 billion soon after the large contingent liabilities of the Auction 35 winners were eliminated from those carriers' books.⁴²

multiplier," which is the multiplier used in my analysis. See JOHN MAYNARD KEYNES, A GENERAL THEORY OF EMPLOYMENT, INTEREST, AND MONEY 115 (Harcourt Brace & Co. 1964) (1936).

39. DORNBUSCH & FISCHER, *supra* note 38, at 66.

40. KEYNES, *supra* note 38, at 115.

41. Glenn Bischoff, *Gasping for Air*, WIRELESS REV., Mar. 1, 2002 (downloaded from Wireless Review's website at <http://industryclick.com/magazine.asp?magazineID=9&siteID=3&releaseID=9957>).

42. Spending of between \$500 million and \$3 billion to relieve congestion is a conservative expectation because two of the largest U.S. wireless carriers have spent over \$4 billion on yearly congestion relief. Although some carriers have stated that they would spend proportionately more to build out the NextWave spectrum, the present discounted value of such build-out would be less than the present discounted value of the build-out associated with alternative spectrum. Hence, the timing of investment, and not just the size of investment, is

This capital spending would multiply in its expansionary effect on GDP as it is moved from wireless carriers to equipment manufacturers to employees. The Bureau of Economic Analysis (BEA) in the Department of Commerce estimates that the multiplier effect for telecommunications services is 2.51.⁴³ A dollar increase in telecommunications output will eventually increase U.S. GDP by \$2.51.⁴⁴ Thus, spending to relieve existing wireless congestion could eventually increase GDP by between \$1.3 billion and \$7.5 billion.⁴⁵ The timeframe over which GDP would increase by this multiple is debatable. The BEA considers one year to be the appropriate time horizon for its multipliers to have achieved full effect.⁴⁶ Other economists have estimated that two years may be required for incremental investment to achieve its full impact on the macroeconomy.⁴⁷

B. Spectrum Procurement

As noted above, cell splitting is not a permanent solution to congestion problems in wireless networks, and the wireless carriers have all upgraded their networks to digital in all the major markets. Thus, any further capacity benefits from converting from analog is minimal. Additional bandwidth, coupled with network modification, may be more cost-effective.⁴⁸ Furthermore, incremental wireless services require additional spectrum licenses. Consequently, the acquisition of new spectrum is vital to the growth of the wireless industry. It is therefore

important when comparing alternative investment plans. See Lehman Brothers, *supra* note 21, at 3; AT&T WIRELESS, *supra* note 14, at 17.

43. BUREAU OF ECONOMIC ANALYSIS, REGIONAL MULTIPLIER DATA, *supra* note 1, at Table 1.4.

44. BUREAU OF ECONOMIC ANALYSIS, U.S. DEPARTMENT OF COMMERCE, REGIONAL MULTIPLIERS: A USER HANDBOOK FOR THE REGIONAL INPUT-OUTPUT MODELING SYSTEM (RIMS II) U.S. 8 (3d ed. 1997) [hereinafter I-O MODELING HANDBOOK].

45. In addition to the economic benefits from spending on congestion relief, dropped wireless calls cause economic harm to wireless users. Increased costs of capital will cause wireless carriers to delay spending on congestion relief, and, therefore, my analysis understates the benefits to the macroeconomy from congestion relief.

46. *Id.* at 8.

47. See, e.g., ROBERT J. GORDON, MACROECONOMICS 483-84 (Harper Collins 6th ed. 1993).

reasonable to expect that wireless carriers would compete vigorously to acquire new, prime spectrum if the FCC were to let such bandwidth at auction. Given that three of the largest wireless providers in the United States carry, either directly or through their designated bidding entities,⁴⁹ over \$12 billion in contingent liabilities from Auction 35 it is reasonable to expect that those wireless carriers would redeploy a portion of these funds into spectrum acquisition if they could opt out of their Auction 35 bids. However, if the overhang of these large contingent liabilities is not removed, it is likely that three of the most experienced wireless carriers would reduce their demands for spectrum in future auctions.⁵⁰

There are currently two potential auctions that would be affected by the Auction 35 contingent liabilities. The first is an auction resulting from the allocation of 90 MHz of spectrum in the 1710-1755 and 2110-2170 MHz bands.⁵¹ The second is the FCC's upper 700 MHz auction, which was pending rescheduling as of the end of July 2002.⁵² If the 1710-1755 MHz bands are cleared from government transmissions and if the encumbrance problem with television broadcasters operating within channels 59 to 69 is solved,⁵³ both auctions would offer wireless nationwide spectrum. Because the upper 700 MHz auction is more clearly defined at this point, the analysis below refers to this particular auction. However, the analysis would apply to any other broadband spectrum auction.

48. See Martin J. Feuerstein, *Capacity Smarts*, WIRELESS REV., Dec. 12, 2001 (downloaded from Wireless Review's website at http://wirelessreview.com/ar/wireless_capacity_smarts/index.htm).

49. "Designated bidding entity" refers to a firm that is allowed to bid at auction. Wireless carriers bidding in spectrum auctions sometimes create subsidiaries, or entirely new firms, whose sole purpose is to acquire spectrum at auction. In Auction 35, Alaska Native was a bidding entity for AT&T Wireless, while Salmon was a bidding entity for Cingular.

50. If the three largest wireless carriers had the opportunity to opt out of \$12 billion of Auction 35 bids, they would not necessarily devote all of those freed resources to bidding in a future broadband spectrum auction. For example, those carriers would spend some capital to relieve congestion.

51. NTIA SPECTRUM REPORT, *supra* note 2.

52. *Upper 700 MHz Band Rescheduling Notice*, *supra* note 2.

It is possible to estimate the expected proceeds from a spectrum auction given the current price of spectrum and a level of bidding intensity similar to that observed in Auction 35. One can then estimate the price-elevating effect on spectrum in Auction 35 from the robust participation of the three largest bidders. The following analysis suggests that, if these bidders were unable to bid in the 700 MHz auction, the auction proceeds would fall by \$9.5 billion. If these bidders were forced to reduce their demand for spectrum by 50 percent because of their contingent liabilities from Auction 35, then auction proceeds for the 700 MHz spectrum would fall by \$6.8 billion.

To determine the current price of spectrum, one must account for the effect that the current weakened state of the wireless industry would have on the prices observed at auction relative to the prices bid in January 2001 (at the end of Auction 35). Discounting the Auction 35 prices by at least 56 percent—the decline in the wireless industry’s market capitalization between January 26, 2001 and July 22, 2002—is a rough but defensible correction. In Auction 35, the price of spectrum was \$4.18 per MHz, per person.⁵⁴ If discounted by 56 percent, prices in a hypothetical broadband spectrum auction conducted in July 2002 would be approximately \$1.84 per MHz-pop. This estimate is conservative because the decline in the wireless industry’s market capitalization resulted from a decline in growth of demand for *existing* services, whereas the acquisition of incremental spectrum will almost certainly be used to provide new, improved services, in addition to congestion relief.⁵⁵ But this estimate could be too large, because greater

53. See, e.g., *Paxson Opposes Any Delay of Spectrum Auctions*, Paxson Communications Press Release (Mar. 2, 2002). Lowell W. Paxson, chairman of Paxson Communications Corp., stated in March 2002 that broadcasters encumbering channels 59 to 69 were meeting regularly to discuss voluntary agreements to clear the spectrum. *Id.*

54. “MHz-pop” is the abbreviation typically used for “per MHz, per person.”

55. European 3G spectrum auctions yielded far higher prices, although some analysts speculated that bidders overpaid. The U.K. 3G auction fetched over \$35 billion, and bids in the German 3G auction totaled more than \$46 billion. See Stephanie Gruner & Marc Champion, *Britain Hits Jackpot in Telecom Auction*, WALL ST. J., Apr. 28, 2000, at A17 (listing the prices, and quoting John Matthews, a consultant at Ovum Ltd., that prices were higher than

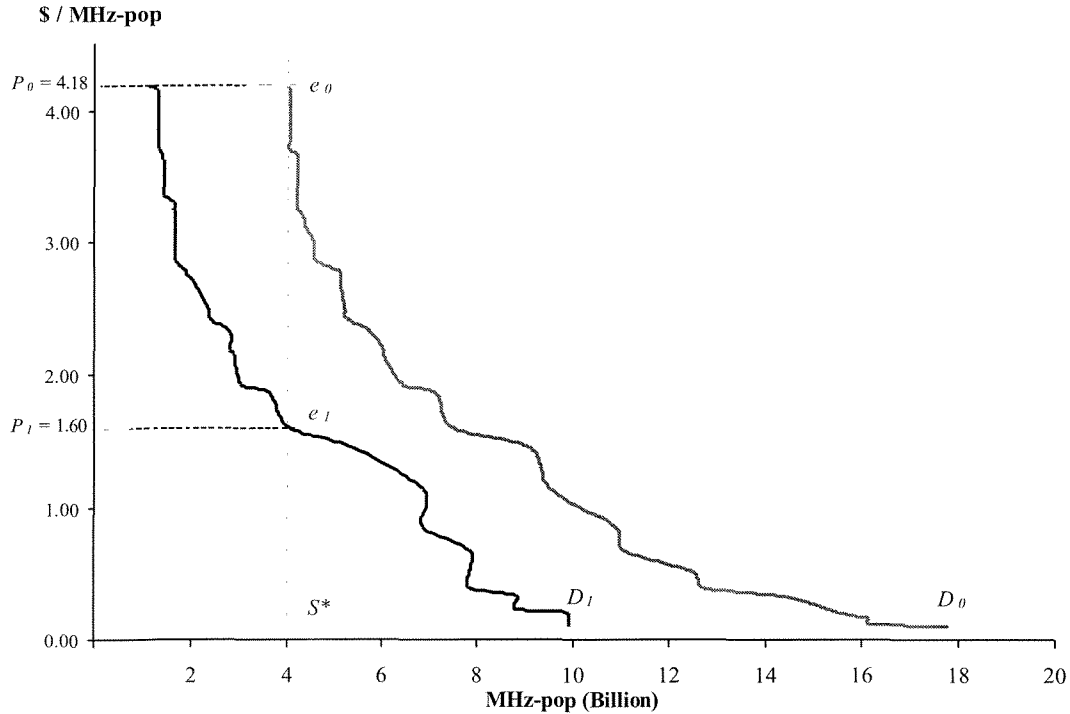
uncertainty surrounding the demand for new services is typical. Nevertheless, at a price of \$1.84 per MHz-pop, wireless carriers could pay \$15.4 billion for the spectrum in the 700 MHz auction.⁵⁶

The three largest bidders in Auction 35 represented 83.2 percent of the “net-winning bids,” which are winning bids adjusted for small-bidder credits. Without these three bidders, proceeds from Auction 35 would have been \$6.4 billion, a reduction of 61.8 percent. Figure 6 shows the simple supply and demand model that indicates this price reduction.

bidders intended); Christopher Stern, *German Airwaves Fetch High Bids; Prices Spur Second Thoughts in U.S.*, WASH. POST, Aug. 18, 2000, at E3 (listing German 3G prices). The most recent 3G auction in Taiwan, which concluded in February 2002, resulted in spectrum prices of \$0.87 to \$0.98 per MHz-pop. *See Greater China: Taiwan Awards Five 3G Licenses*, ASIAN WALL ST. J., Feb. 7, 2002, at *1 (listing prices for spectrum). The United States is, no doubt, a more attractive wireless market than Taiwan, so the estimate used here of \$1.84 per MHz-pop for the United States is conservative.

56. If the prices at the most recent 3G auction in Taiwan (roughly \$1.00 per MHz-pop) were used as a benchmark, *see* note 55 *supra*, the price of spectrum in the 700 MHz auction would be \$8.4 billion.

FIGURE 6: AUCTION 35 PRICES WITHOUT THE THREE LARGEST BIDDERS



Source: Round-by-round bidding for Auction 35 is available on the FCC's web site at http://auctionresults1.fcc.gov/PCS/Broadband/BTA/Auction_35/Results/.

The vertical curve S^* represents the supply of spectrum at auction. The supply, expressed in MHz-pop, is fixed in an auction—the FCC lets a fixed number of licenses at auction. Each license covers a particular population and a particular amount of bandwidth. The sum of MHz-pop for all auctioned licenses gives the market supply curve. The market demand curve is the MHz-pop of spectrum that bidders demanded in the auction, given the prices of spectrum in a particular auction round. As prices rise, quantity demanded falls.

The market equilibrium is found where the market demand curve intersects the market supply curve. To find the market-clearing price, one draws a horizontal line from the market equilibrium to the price axis. Thus, e_0 represents the Auction 35 equilibrium, where market supply intersected market demand (D_0), and P_0 , which equals \$4.18 per MHz-pop, is the market-

clearing price. If the three largest bidders in Auction 35 had not bid, the equilibrium price would have fallen to \$1.60 per MHz-pop. The equilibrium e_I and the demand curve D_I represent the equilibrium and market demand corresponding to this demand reduction. One can calculate D_I by subtracting the quantities demanded by the three largest carriers from the demand curve D_0 at each market price during Auction 35. Thus, if the three largest carriers had not bid in Auction 35, prices would have been 61.8 percent lower.⁵⁷ Using a similar methodology, one finds that prices would have been 43.8 percent lower if the three largest carriers had reduced their demand for spectrum by 50 percent.⁵⁸

The analysis presented earlier indicated that, on the basis of prices bid in recent spectrum auctions and current market conditions, the future 700 MHz auction could fetch \$15.4 billion according to July 2002 prices. If, however, the contingent liabilities from Auction 35 prevented the three largest carriers from bidding in the 700 MHz auction, prices would be expected to fall by 61.8 percent and winning bids would therefore be only \$5.9 billion. If the contingent liabilities forced the three largest carriers to reduce their demand by 50 percent relative to their demand in Auction 35, then auction proceeds in the 700 MHz auction would be \$8.7 billion, or a \$6.8 billion decline. Thus, relieving the carriers of their contingent liabilities from Auction 35 could increase the expected proceeds in the future 700 MHz auction by as much as \$9.5 billion. These prices reflect payments for *unencumbered* spectrum.

However, there must be a plan for incumbent UHF broadcasters to vacate the spectrum before the 700 MHz auction can occur, and the broadcasters will demand compensation for vacating. The broadcasters' proposed compensation package calls for the creation of a private

57. This predicted price reduction does not account for any further price effects arising from uncertainty concerning the FCC's ability to deliver the auctioned spectrum in a timely manner.

58. If these carriers had reduced demand by 50 percent, prices would have been \$2.35 per MHz-pop.

fund that is linked to the bids in the FCC's future 700 MHz auction.⁵⁹ Putting aside the details of this spectrum-clearing arrangement, if adopted, the end result would be that the U.S. Treasury would collect 62 percent of what bidders pay for unencumbered spectrum. The remaining 38 percent would, under the proposal, go into a fund used to pay compensation for vacating the spectrum.⁶⁰ If the 700 MHz auction were to start in 2003 or 2004, then such a plan would be useful because the spectrum would be encumbered for three or four years after the auction. Alternatively, if the start date of the 700 MHz auction moves closer to year-end 2006, then carriers will likely negotiate separate clearing agreements with broadcasters after the auction. The following analysis uses the broadcaster's spectrum-clearing plan to estimate the economic effects of increased bidding activity in the 700 MHz auction on domestic GDP.

I estimated that if the Auction 35 contingent liabilities were erased, an additional \$6.8 billion to \$9.5 billion could be bid for *unencumbered* spectrum. If carriers agree to the broadcasters' plan, incumbent UHF broadcasters would receive 38 percent of these additional funds, or between \$2.6 billion and \$3.6 billion. The Treasury would receive 62 percent, or between \$4.2 billion and \$5.9 billion. The incumbent UHF broadcasters include such firms as Paxson Communications and USA Networks, and it is therefore reasonable to expect that the auction proceeds paid to those firms would be invested in the television broadcasting industry,

59. Spectrum Exchange Group, LLC, *Petition for Rule Making by Spectrum Exchange, LLC Concerning Rules to Facilitate Clearing of the 746-806 MHz Band*, WT Dkt. No. 99-168 at 10 (FCC Apr. 24, 2000).

60. The current proposed spectrum-clearing plan stipulates that for every \$1.00 bid into the FCC's auction, an amount must be paid to a separate fund for the UHF broadcasters that encumber the spectrum. In exchange, the UHF broadcasters will agree to vacate their licenses before December 2006, the expiration date for those licenses. *See* Spectrum Exchange Group, LLC, *Spectrum Exchange Comments on 746-764 and 776-794 MHz Bands*, WT Dkt. No. 99-168 at 5 (FCC Aug. 16, 2000). Currently, the UHF broadcasters encumber 61 percent of the U.S. population. Thus, a bid of \$.61 to the fund for every \$1.00 bid at auction has been informally suggested. Under this scenario, the Treasury would receive 62 percent of total price bid for *unencumbered* spectrum, calculated as $(\$1 \div (\$1 + \$0.61))$. The UHF broadcasters would receive the remaining 38 percent.

which has a multiplier of 3.58.⁶¹ The full macroeconomic effect of the spectrum-clearing fund to the broadcasters would therefore be between \$9.3 billion and \$12.9 billion.

The Treasury might choose to use its share of the 700 MHz auction proceeds to pay for increased government spending or to retire or service debt that it had already issued. If the Treasury were to use all of its proceeds for additional government spending, then the resulting increase in GDP would be between \$11.0 billion and \$15.5 billion.⁶² If the Treasury were to use all its proceeds from the upper 700 MHz auction to retire existing debt, then GDP would be unchanged. To clarify, the increase in government spending would have occurred with, or without, the 700 MHz auction proceeds. Therefore, this money would be a “leakage,” and would not increase GDP.⁶³ Thus, the combined macroeconomic effect of the increase in spectrum-auction proceeds to the Treasury and to the UHF broadcasters would be between \$9.3 billion and \$28.3 billion *before January 2005*. That date would be the earliest that the Treasury could collect its remaining Auction 35 proceeds (totaling \$16 billion) if the FCC were to triumph over NextWave both in the Supreme Court and in subsequent litigation concerning auction issues not addressed by the current grant of certiorari.

Applied to another broadband spectrum auction, this analysis would yield similar results. If any broadband auction were held before the contingent liabilities from Auction 35 were removed, bidders in that auction would bid less aggressively because of the Auction 35 contingent liabilities. Relieving bidders of those liabilities would increase the intensity of

61. BUREAU OF ECONOMIC ANALYSIS, REGIONAL MULTIPLIER DATA, *supra* note 1, at Table 1.4.

62. One can calculate the increase in GDP by using an average multiplier (2.62) for all industries, weighted by the industries' 2000 GDP. *See* BUREAU OF ECONOMIC ANALYSIS, U.S. DEPARTMENT OF COMMERCE, Regional Input-Output Modeling System (RIMS II), Table 2.4; BUREAU OF ECONOMIC ANALYSIS, U.S. DEPARTMENT OF COMMERCE, Industry Accounts Data, downloaded from <http://www.bea.doc.gov/bea/dn2/gpoc.htm>.

63. *See, e.g.*, GORDON, *supra* note 47, at 39.

bidding at the auction. Auction receipts would rise, and the increase in GDP from the auction would be larger. This stimulus would occur by 2005 or 2006.

C. Build-out of New Licenses

After acquiring new licenses, wireless service providers would likely build out new networks or upgrade their existing networks to provide new services. Dennis Strigl, chief executive officer of Verizon Wireless, testified before the House Subcommittee on Telecommunications and the Internet in December 2001 that, if his company could take delivery of its of licenses from Auction 35, it would spend slightly less than the bid price over five to seven years for infrastructure and additional network capacity to deploy that spectrum.⁶⁴ If the other wireless carriers were to win blocks of broadband spectrum at auction, they would likely spend similar sums to build out that spectrum. The earlier analysis indicated that between \$6.8 billion and \$9.5 billion in additional funds could be spent in the future 700 MHz auction if the FCC were to erase the carriers' contingent liabilities. Therefore, it is reasonable to expect that the carriers would spend an additional \$5 billion to \$10 billion to build out the spectrum by between 2008 and 2010.⁶⁵ With a multiplier of 2.51, this spending would increase GDP by \$12.6 billion to \$25.1 billion between 2010 and 2012. Of course, wireless carriers would first build out the most profitable markets, which are the largest. This sequence of investment would push a disproportionate share of capital expenditures into the first few years following the 700 MHz auction. Thus, the largest portion of the increase in GDP would occur during the first few years

64. *The Settlement Between the U.S. Government and Nextwave Telecom Inc. to Resolve Disputed Spectrum Licenses: Hearing Before the Subcomm. on Telecommunications and the Internet of the House Comm. on Commerce*, 107th Cong., 1st sess. 50, 69 (2001) (testimony of Dennis Strigl).

65. This is a reasonable estimate given that two of the largest wireless carriers have *separately* spent upwards of \$4 billion yearly on wireless infrastructure. See Lehman Brothers, *supra* note 21, at 3; AT&T WIRELESS, *supra* note 14, at 17.

following that auction. Table 3 summarizes the economic impact on U.S. GDP from allowing bidders to opt out of their Auction 35 bids.

TABLE 3. THE ECONOMIC STIMULUS OF ALLOWING BIDDERS TO OPT OUT OF AUCTION 35

Investment Category	Date	Capital Spending		GDP Increase	
		Low (\$B)	High (\$B)	Low (\$B)	High (\$B)
Congestion relief	2003-2005	0.5	3.0	1.3	7.5
Spectrum acquisition (Funds to Treasury)	2003-2005	0.0	5.9	0.0	15.5
Spectrum acquisition (Funds to broadcasters)	2003-2005	2.6	3.6	9.3	12.9
Build-out of new spectrum	2003-2012	5.0	10.0	12.6	25.1
		<i>Nominal Total (\$B)</i>		23.1	61.0
		<i>Total Expressed in 2002 (\$B)</i>		19.1	51.5
		<i>Nominal Total Before Year-End 2005 (\$B)</i>		13.4	41.5
		<i>Total Before Year-End 2005, Expressed in 2002 (\$B)</i>		12.1	37.7

Allowing bidders to opt out of their Auction 35 bids would increase U.S. GDP by between \$12.1 billion and \$37.7 billion, expressed in 2002 dollars,⁶⁶ by year-end 2005.⁶⁷ The full economic impact of this stimulus would be an increase in U.S. GDP of between \$19.1 billion and \$51.5 billion by 2012.

66. All dollar figures in this section are discounted to their equivalence in 2002 dollars. I use the Office of Management and Budget's (OMB's) three-year discount rate of 4.1 percent to calculate the net present value of spending to relieve current congestion, investment in spectrum acquisition, and investment by the UHF broadcasters. I use the OMB's 10-year discount rate of 5.1 percent to discount the economic impact of investment to deploy newly acquired spectrum. See, OFFICE OF MANAGEMENT AND BUDGET, EXECUTIVE OFFICE OF THE PRESIDENT, MEMORANDUM FOR HEADS OF EXECUTIVE DEPARTMENTS AND ESTABLISHMENTS: GUIDELINES AND DISCOUNT RATES FOR BENEFIT-COST ANALYSIS OF FEDERAL PROGRAMS, OMB Circular No. A-94, Appendix C (released Feb. 2002) (modifying OMB Transmittal Memo No. 64, published on Oct. 29, 1992) (downloaded at <<<http://www.whitehouse.gov/omb/circulars/a094/a094.html>>>).

67. To calculate the lower bound of the economic stimulus (\$12.1 billion) I assume that the stimulus from the build-out of new spectrum acquisition would occur evenly over time. I divide the stimulus from the build-out of newly acquired spectrum (\$12.6 billion) by the number of years over which it will occur (9) to determine the economic impact, per year, of this stimulus. The yearly stimulus would be \$1.4 billion, and would increase U.S. GDP in the years ending 2004 and 2005. In 2002 dollars, the stimulus would be \$1.3 billion in 2004, and \$1.2 billion in 2005. Adding \$2.5 billion to the discounted GDP growth from investment by UHF broadcasters (\$8.4 billion) and the discounted economic growth from investment to relieve current congestion (\$1.2 billion), yields a

In contrast, if the FCC does not allow bidders to opt out of Auction 35, and instead attempts to reclaim the NextWave spectrum through litigation, the Auction 35 proceeds would not affect U.S. GDP until 2006 and 2007, at the earliest. If the winning bidders from Auction 35 were to deploy their Auction 35 spectrum over seven years, the economic stimulus from that investment would be complete by 2014. If the FCC were *certain* that it could win the NextWave spectrum through litigation, and if the Treasury were to invest *all* of the Auction 35 proceeds back into the U.S. economy, U.S. GDP would rise by \$36.1 billion by the end of 2007.⁶⁸ However, allowing wireless carriers to opt out of their Auction 35 winning bids would increase U.S. GDP by \$51.5 billion. Were the winning bidders from Auction 35 to spend \$6.1 billion between 2005 and 2012 to deploy the spectrum, U.S. GDP would rise by an additional \$15.4 billion via the multiplier effect,⁶⁹ making the FCC indifferent between those two stimulus packages.

A \$6.1 billion investment by the winning Auction 35 bidders to deploy broadband spectrum may sound reasonable, but the FCC cannot be certain that it will reclaim the NextWave spectrum through litigation. Although it is possible that the FCC could reclaim the disputed spectrum and force winning bidders to pay the Auction 35 prices, the FCC could lose its dispute with NextWave, in which case Auction 35 would be void.⁷⁰ Under the first scenario, an

\$12.1 billion increase in GDP before the end of 2005. This is a conservative calculation because carriers would build out their largest markets first, causing a disproportionate amount of investment to be spent soon after the auction.

68. If the U.S. government were to increase fiscal spending by \$16.8 billion by the end of 2005, U.S. GDP would increase by \$44 billion (\$16.8 billion multiplied by 2.62) by the end of 2007. If that stimulus were spread evenly between 2006 and 2007, the NPV of that stimulus (using a discount rate of 4.5 percent) would be a \$36.1 billion increase in U.S. GDP.

69. Recall that the multiplier for telecommunications services is 2.51. See BUREAU OF ECONOMIC ANALYSIS, REGIONAL MULTIPLIER DATA, *supra* note 1, at Table 1.4.

70. A third scenario could also occur. The FCC could reclaim the NextWave spectrum, but Auction 35 bidders might challenge the FCC's claim that it does not owe a contractual obligation to the bidders. See Requests for Refunds of Down Payments Made in Auction No. 35, 17 F.C.C. Rcd. 6283, 6291 ¶ 14 (2002) [hereinafter *Refund Order*]. If the FCC were to lose such a battle, then the economic stimulus of the Auction 35 bids would be muted.

economic stimulus would occur. Under the second scenario, an economic stimulus would occur only if NextWave were to invest further in the deployment of the spectrum. Such investment is unlikely in the near-term given NextWave's financial state. Thus, the FCC must adjust the economic stimulus that would be achieved by reclaiming the NextWave spectrum by the probability that it will win its litigation. To do otherwise would overstate the economic benefits of the FCC's current policy regarding Auction 35.

Allowing bidders to opt out of their Auction 35 liabilities would produce an economic stimulus of up to \$51.5 billion. If the FCC has a 50-50 chance of reclaiming the NextWave spectrum and enforcing the Auction 35 winning bids, an economic stimulus of \$103 billion would be required to make the FCC indifferent between fighting to reclaim the spectrum and allowing bidders to opt out of their Auction 35 liabilities.⁷¹ The economic stimulus from the Auction 35 proceeds would be only \$36.1 billion. Investment to deploy the spectrum would need to make up the remaining stimulus for the FCC's current policy regarding Auction 35 to be worthwhile. In particular, wireless operators would have to invest sufficiently in the deployment of Auction 35 spectrum to generate a \$66.9 billion increase in GDP. Such a stimulus would occur only if wireless operators were to invest \$9.6 billion *per year* between 2005 and 2012 to deploy the Auction 35 spectrum. Thus, the FCC's current policy regarding Auction 35 is inferior to one that allows wireless carriers to opt-out of their winning bids from Auction 35.

71. Multiplying \$103 billion by 0.5 yields \$51.5 billion, which would be the economic stimulus from allowing bidders to withdraw from their winning bids from Auction 35.

III. THE COSTS OF NOT ALLOWING BIDDERS TO OPT OUT OF AUCTION 35

Two additional social costs have arisen or will arise if the FCC continues to pursue its current course with respect to Auction 35.⁷² First, by undermining confidence in the auction process, the FCC will diminish revenues from future auctions. Such forgone revenues would otherwise obviate the U.S. Treasury's raising of equivalent revenue from other sources. Second, the uncertainty of when (and even whether) the Auction 35 licenses will be granted has stifled activity in the secondary market in spectrum.

A. Lower Auction Proceeds

The FCC explained its policy on Auction 35 in a decision in March 2002:

Although winning bidders continue to be bound by their bid obligations, we recognize that we have some discretion with respect to the amount of their down payments we maintain on deposit. We are sympathetic to the needs of Petitioners, many of whom are small businesses, to have access to their funds to continue to operate their businesses. At the same time, we must *protect the integrity* of Auction No. 35 in the event the Commission is ultimately successful in its litigation and a bidder subsequently defaults on its payment obligations.⁷³

To an economist, "protecting the integrity" of an allocation mechanism is synonymous with the goal of efficiency—that is, allocating the resource in a way that maximizes its value to society.⁷⁴

72. The continuation of the FCC's current course will produce more than these two social costs, but I restrict the analysis to two for the purposes of this paper. One example of an additional social cost of the FCC's current course is the consumer welfare loss from dropped calls, which will not be abated unless capital is freed up for wireless providers to build-out and improve existing spectrum. A rough approximation of the annual welfare loss from dropped calls is \$343 million. That number is calculated by taking the total minutes of U.S. wireless use in 2001 (400 billion), CELLULAR TELECOMMUNICATIONS & INTERNET ASSOCIATION, CTIA'S SEMI-ANNUAL SURVEY RESULTS: JUNE 1985-DECEMBER 2001, 2002, and multiplying by the federal minimum wage (\$5.15 hourly), downloaded from the U.S. Dept of Labor at <<<http://www.dol.gov/esa/whd/flsa/>>>, pro-rated for a one-minute interval ($8.58¢ = \$5.15 \text{ hourly} / 60 \text{ minutes}$), and an assumed fault rate of one percent. This calculation is conservative because the actual number of wireless minutes of use was greater than 400 billion in 2001 and because the assumed duration of welfare loss for a dropped call is assumed to be only one minute. Calculations of consumer welfare loss that apply given wage rates to time periods are standard in economics. See, e.g., PATRICK S. MCCARTHY, TRANSPORTATION ECONOMICS 487-82 (Blackwell Publishers 2001).

73. *Refund Order*, *supra* note 70, at 6290 ¶ 12 (emphasis added).

74. Economists study integrity under the lens of reputation effects in a dynamic game. Put differently, an economic outcome can depend on the ability of one economic agent to convey to another agent that she is of a given type. Reputations then develop as both agents view their competitor's actions over time. See, e.g., OLIVER E. WILLIAMSON, THE MECHANISMS OF GOVERNANCE 115-16 (Oxford University Press 1996).

To the extent that auction receipts serve as proxy for the social value of the spectrum (higher receipts imply greater social value), one can measure how well the FCC would “protect the integrity” of the auction process by examining the impact of its policies on future auction receipts. This fundamental point about the social value of spectrum does not imply that the FCC’s goal in a spectrum auction is to maximize revenue. Rather, the FCC serves the public interest when it makes the spectrum license as valuable as possible, given the particular auction design that the Commission chooses (including, for example, an auction that is designed to award bidding credits for designated entities).

The FCC believes that it can protect the integrity of the auction process by holding the winning bidders of Auction 35 accountable for their bids—even though it cannot deliver the licenses. It can be argued with no less plausibility however, that the FCC has actually eroded confidence in the auction process by denying that it owes any contractual obligation to winning bidders in Auction 35 to deliver spectrum in a timely manner.⁷⁵ The consideration of this negative effect would lower the government’s receipts from future spectrum auctions, as future bidders lower their bids to compensate for the risk of unreliable delivery by the FCC. Because future auction receipts are likely to be lower, the FCC’s policy will undermine the efficiency of the auction mechanism. The lower auction receipts reflect the destruction of value that occurs when the FCC’s conduct makes the rights to use the spectrum ambiguous or unreliable.

B. Harm to the Secondary Spectrum Market

Denying carriers the opportunity to opt out of their Auction 35 bids will harm the secondary market for spectrum. That market makes possible sales of spectrum licenses from one carrier to another. Because the Auction 35 bidders are uncertain of the extent of their spectrum

holdings in 2005, they will be hesitant to purchase spectrum in the short term through the secondary market. These bidders understand that spectrum purchased on the secondary market would be less productive in 2005 if, at that time, they obtain spectrum from Auction 35.

An analysis of a wireless carrier's production decision clarifies this argument. A wireless operator can increase capacity on its network by investing in spectrum purchased in the secondary market or by adding wireless equipment to relieve congestion. Because spectrum and wireless equipment are complements of production for a wireless carrier⁷⁶—that is, both spectrum and wireless equipment are needed to operate a network—incremental spectrum produces diminishing increases in capacity if the wireless equipment in the carrier's network is unchanged. Likewise, incremental wireless equipment will produce diminishing improvements in network capacity for a fixed amount of spectrum. This concept is known as the law of diminishing returns to a factor input.⁷⁷ If a winning bidder from Auction 35 purchases spectrum on the secondary market to relieve congestion on its network, that carrier would experience large diminishing returns to spectrum were it to obtain the Auction 35 spectrum. A carrier holding contingent liabilities from Auction 35 will thus withhold its current demand for spectrum purchased on the secondary market, because the incremental productivity of that spectrum could diminish in 2005. The FCC's actions distort carriers' choices among factor inputs by increasing uncertainty as to the spectrum input, precluding efficient operation of the secondary spectrum market.

75. *Refund Order*, *supra* note 70, at 6291 ¶ 14.

76. *See, e.g.*, PINDYCK & RUBINFELD, *supra* note 18, at 195 (discussing complements of production using a "fixed-proportion production function" as an illustrative example).

77. *See, e.g., id.* at 191.

CONCLUSION

The FCC's conduct regarding Auction 35 is stifling the economic recovery of the struggling wireless industry. Between the end of Auction 35 in January 2001 and July 2002, the major wireless service providers and equipment manufacturers with operations in the United States lost over \$850 billion, or 65 percent, in market value, while rural carriers have lost close to 84 percent. During that same time period, the telecommunications industry laid off nearly a quarter of a million workers. Making matters worse is the Auction 35 debt that looms over the wireless carriers. The winning bidders from Auction 35 must treat their obligations as contingent liabilities without deriving any benefit from the underlying asset. Those contingent liabilities have raised the carriers' costs of capital, delayed investment in new services and build out, impaired credit ratings, and prompted investment bankers to conclude that Auction 35 has increased uncertainty in the wireless industry.

The removal of the Auction 35 debt overhang would benefit the entire economy. With the contingent liabilities removed from their books, the wireless carriers would invest in additional equipment to relieve congestion. GDP would increase multiplicatively, and new jobs would be created as this investment flowed through the economy. Wireless providers would also acquire more spectrum licenses, increasing the Treasury's proceeds in future auctions. Without their Auction 35 liabilities, three of the most experienced wireless carriers would increase their demands for auctioned spectrum, increasing GDP by up to \$38 billion through 2005. The wireless carriers would then invest in equipment to deploy the newly purchased spectrum. The total increase in GDP from the reallocation of capital that would result from permitting winning bidders to opt out of Auction 35 would be between \$19 billion and \$52 billion, expressed in current dollars.

Denying the carriers the opportunity to opt out of Auction 35 may undermine the auction process that the FCC states that it wants to protect. The FCC will increase uncertainty in the market for auctioned spectrum if it holds carriers accountable for winning bids for licenses that the agency cannot deliver. Bidders will discount their future bids accordingly, and auction revenues will fall.

The FCC's current policy regarding Auction 35 is also an impediment to economic activity in the secondary spectrum market. A wireless carrier would overpay for spectrum purchased today on the secondary market if that carrier were to ignore the possibility of acquiring Auction 35 licenses in the future. Hence, the FCC's current policy regarding Auction 35 reduces the demand for spectrum sold in the secondary market.

By holding bidders to a \$16 billion liability to pay for spectrum that it cannot deliver, the FCC has impaired the ability of wireless carriers to raise capital to invest in new services that would benefit consumers. The FCC's policy toward Auction 35 has been a negative stimulus package for a wireless industry desperately in need of a recovery, and it has compromised the very auction program that the FCC has sought to protect.

Attachment C

**IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

CELLCO PARTNERSHIP d/b/a
VERIZON WIRELESS

Petitioner,

v.

THE FEDERAL COMMUNICATIONS
COMMISSION and the UNITED STATES

Respondents.

No. _____

**DECLARATION OF WILLIAM F. HEITMANN
IN SUPPORT OF
VERIZON WIRELESS'S REQUEST FOR EXPEDITED REVIEW**

William F. Heitmann declares:

1. I am Treasurer of Verizon Communications Inc. ("Verizon Communications")

My responsibilities include overall cash management and all forms of capital raising for the company. I am authorized to make this declaration on behalf of Verizon Communications and Celco Partnership, d/b/a Verizon Wireless ("Verizon Wireless").

2. The purpose of this declaration is to describe some of the immediate and ongoing financial effects of the potential liability of Verizon Wireless to the Federal Communications Commission for certain spectrum licenses offered by the FCC in what is known as Auction No. 35.

3. Verizon Wireless is a partnership owned 55% by Verizon Communications and 45% by Vodafone PLC. Verizon Communications, through a funding subsidiary, lends Verizon Wireless capital for ongoing business needs and asset purchases. Pursuant to the Verizon Wireless partnership agreement, Vodafone PLC is under no obligation to infuse or loan capital to Verizon Wireless.

4. Verizon Communications' loans to Verizon Wireless are intra-company loans. The rate charged on these loans reflects the borrowing costs of Verizon Communications. Verizon Wireless's debt is consolidated on Verizon Communications' books; therefore the debt rating agencies and the capital markets attribute the debt to Verizon Communications. Verizon Communications funds Verizon Wireless in this manner because it is less costly when Verizon Communications raises capital and then lends it to Verizon Wireless than it would be were Verizon Wireless to raise capital on its own. The intra-company loan process therefore saves interest expense for Verizon Communications and Verizon Wireless.

5. Verizon Wireless was the successful bidder for 113 spectrum licenses offered at the FCC's Auction No. 35, which concluded in January of 2001. Verizon Wireless's successful bids for these licenses totaled approximately \$8.8 billion. Pursuant to FCC rule, Verizon Wireless was required to deposit approximately \$1.8 billion of this amount with the FCC within 45 days following the close of the auction. Verizon Wireless did so with funds provided by Verizon Communications. The balance of approximately \$7 billion was to have been due ten days after the FCC's notice of the availability of the licenses to Verizon Wireless.

6. Thirty-three of the licenses purchased by Verizon have been granted. These

licenses cost \$82 million, which Verizon Wireless has paid.

7. Sixty-seven of the licenses purchased by Verizon Wireless had previously been issued to NextWave Personal Communications Inc. and NextWave Power Partners Inc. (together, "NextWave"), and 13 had previously been issued to Urban Communications ("Urban"). These 80 licenses account for approximately \$8.7 billion of Verizon Wireless's successful bids, and \$1.7 billion of its deposit with the FCC. On March 27, 2002, the FCC announced that it would allow successful bidders in Auction No. 35 to recover 85% of their deposits, which for Verizon Wireless amounts to approximately \$1.5 billion. After the FCC makes this refund, Verizon Wireless will still have \$261 million on deposit that is not earning interest. The ongoing pretax interest cost to Verizon Communications of the balance of the deposit that will continue to be held by the FCC will be over half a million dollars each month.

8. The FCC has not delivered to Verizon Wireless the licenses previously issued to NextWave and Urban, and whether it will ever be able to do so is the subject of litigation. I understand that the FCC takes the position that Verizon Wireless will be liable for the licenses' original bid amounts, and that the \$8.4 billion balance (i.e., the purchase price net of the \$261 million deposit retained by the FCC) will become due and payable on ten days' notice, if and when the FCC is able to issue the licenses at some point in the future. I have been advised that the FCC reiterated this position on March 27, 2002 when it decided to permit successful bidders to recover a portion of their deposits.

9. A contingent liability of \$8.4 billion due on 10 days' notice affects Verizon Communications' and Verizon Wireless's cost of capital. In light of this contingent

liability, two of the three credit rating agencies that rate the company's debt have revised Verizon Communications' credit outlook from "stable" to "negative." For example, on April 5, 2001, Moody's issued a press release (attached as Exhibit A) announcing the change in outlook due in large part to the anticipated payment for the NextWave licenses. On March 22, 2002, Standard & Poor's issued a press release (attached as Exhibit B) stating that the agency had "revised its outlook on Verizon Communications Inc. and its affiliates to negative from stable based on the company's higher-than-expected debt leverage primarily due to additional wireless spectrum purchases and the \$1.7 billion deposit with the FCC for licenses won in the January 2001 auction." On March 28, 2002, Standard & Poor's issued another press release (attached as Exhibit C) stating that, despite the FCC's decision on March 27 to return 85% of Verizon Wireless's deposit, the agency was maintaining this credit rating and outlook status for Verizon "because of the uncertainty regarding Verizon's ultimate obligation to pay the total \$8.7 billion it bid in the auction."

10. Downgrades in Verizon Communications' credit rating substantially increase the company's cost of borrowing. The magnitude of the increase will depend on market conditions and the severity of the downgrade. If the company's rating were downgraded from "Single A Plus" to "Mid Single A" in a relatively normal market, its cost of ongoing funding might increase by 20 to 25 basis points for long term debt and 15 to 20 basis points for commercial paper. Given the company's current funding needs, the overall impact of such a downgrade under normal market conditions would be to increase its cost of borrowing approximately \$25 million per year before taxes; under adverse market conditions, that cost might easily rise to \$50 million per year. If the company's credit

were downgraded below Mid Single A, its costs would increase dramatically because it would be unable to maintain commercial paper levels beyond \$2-to-3 billion. The company would be forced to fund approximately \$8 billion through long term debt at rates that are up to 500 basis points above the rates currently available to the company, costing the company an additional estimated \$400 million in annual pretax interest expense.

11. For example, Verizon Communications has recently issued \$1.5 billion in additional long-term debt in and reduced its short-term debt, thereby increasing Verizon's cost of borrowing by approximately \$77 million per year.

12. The credit agencies have recently focused on the liquidity position of large corporations. They have put additional emphasis on a company's ability to repay short-term obligations within a defined period of time under duress. Given the uncertainty of the obligation to pay for the NextWave spectrum, the agencies will apply some probability that Verizon Communications will be required to make this payment in the near term and require Verizon Communications to reserve additional liquidity for this eventuality. Verizon Communications now maintains access to additional sources of liquidity in the form of cash and a backup credit facility, at a cost of several million dollars a year.

13. The stock market similarly factors the contingent liability into its analysis of Verizon Communications' financial flexibility. This anticipated capital requirement gets added into the capital structure of Verizon Communications by equity investors not only as debt but also as a potential source of dilution if Verizon issues equity. The \$8.7 billion contingent liability thus constrains Verizon Communications' ability to pursue transactions for its own benefit and for the benefit of Verizon Wireless—for example, transactions that would provide alternative sources of the spectrum for Verizon Wireless' needs.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on 4/16/02.


WILLIAM F. HEITMANN

MDY MOODY'S AFFIRMS L-T DEBT RTGS OF VERIZON & OUTLOOKS NOW NEGATIVE
Apr 5 2001 14:02

New York	New York
Dennis Saputo	Robert Konefal
Senior Vice President	Managing Director
Corporate Finance	Corporate Finance
Moody's Investors Service	Moody's Investors Service
JOURNALISTS: (212) 553-0376	JOURNALISTS: (212) 553-0376
SUBSCRIBERS: (212) 553-1653	SUBSCRIBERS: (212) 553-1653

MOODY'S AFFIRMS LONG-TERM DEBT RATINGS OF VERIZON AND SUBSIDIARIES;
OUTLOOKS CHANGED TO NEGATIVE

Approximately \$43 Billion Of Long-Term Debt Affected

New York, April 05, 2001 -- Moody's Investors Service has affirmed the long-term debt ratings of Verizon Communications Inc. ("Verizon") and its subsidiaries, and changed these ratings' outlooks to negative from stable. While Moody's is not presently concerned about Verizon's operating profile, the negative outlooks reflect our increasing concerns about Verizon's growing debt level relative to its cash flow and that continuing negative market conditions will impair Verizon's plans for a partial IPO of Verizon Wireless (55% owned by Verizon).

Moody's A1 rating on Verizon is based on our expectation that Verizon Wireless will successfully complete a partial IPO around mid-year, replacing short-term debt that is expected to be incurred by Verizon and loaned to Verizon Wireless to fund its planned purchase of spectrum and assets. To capitalize on the longer-term potential of the developing wireless data opportunity and solidify its competitive position, Verizon Wireless recently expanded its spectrum ownership, coverage and cellular operations. While we were somewhat surprised by the amount that Verizon Wireless committed to these initiatives, (\$8.8 billion in the C & F block auctions and \$2.1 billion for the wireless assets of Price Communications), we believe that these licenses and assets will significantly strengthen its already strong competitive profile. We still believe that Verizon is committed to executing a partial IPO of Verizon Wireless which we believe is arguably the best positioned and strongest national wireless operator with its large customer base, low cost structure, extensive footprint and coverage, robust technology and strong earnings. However, we believe that the timing and eventual proceeds from the transaction are increasingly distant and uncertain because of market conditions.

MDY

MOODY'S AFFIRMS L-T DEBT RTGS OF VERIZON & OUTLOOKS NOW NEGATIVE
Apr 5 2001 14:02

Moody's anticipates that payment for the C & F block licenses will be required around mid-year. The closing of the Price transaction is currently structured to be one-quarter debt assumption and three-quarters of to-be-issued stock in Verizon Wireless. If Verizon Wireless proceeds with these transactions and we do not have greater visibility into the eventual timing and ultimate proceeds of the IPO, Moody's anticipates that the long-term debt ratings of Verizon and its subsidiaries will be placed on review for possible downgrade around mid-year. Conversely, should the IPO be completed in an amount sufficient to meet the bulk of this very significant capital requirement, Moody's anticipates that the stable outlook will be reinstated.

Moody's believes that a rationalization of international investments, specifically the NTL Incorporated and Telecom Corporation of New Zealand stakes, continues to be important given the need to provide support to the balance sheet.

Moody's ratings of Verizon are also based on our expectation that additional domestic acquisitions and any further stock repurchases will be modest in scope and that should new investment opportunities present themselves, they will be financed in a manner that preserves balance sheet strength.

In order to comply with the long distance provision restrictions of the Telecommunications Act of 1996, Verizon was required to reduce its ownership in Genuity, GTE's internet infrastructure and services provider, to less than 10%. Verizon has an option to increase its ownership in Genuity back up to about 80%, effectively at no cost, once it gains approval to offer long distance service throughout the former Bell Atlantic markets. Since we believe that the exercise of this option has a very high probability of occurring because the long-term financial potential of Genuity's rapidly growing businesses is very significant, we have overlaid a "recapture" of Genuity by Verizon in our ratings. The recapture of Genuity, even after assuming a successful IPO of Verizon Wireless, will utilize a significant amount of the balance sheet flexibility that is available to Verizon at the A1 rating level.

Verizon Communications provides domestic and international wireline and wireless communications services and is headquartered in New York, NY.

end

Provider ID: 00116746
-0- Apr/05/2001 18:02 GMT

MDY

MOODY'S ASSIGNS SR UNSEC NOTES TO BE ISSUED BY VERIZON WIRELESS
Dec 10 2001 11:12

1 of 4

New York
Dennis Saputo
Senior Vice President
Corporate Finance
Moody's Investors Service
JOURNALISTS: 212-553-0376
SUBSCRIBERS: 212-553-1653

New York
Robert Konefal
Managing Director
Corporate Finance
Moody's Investors Service
JOURNALISTS: 212-553-0376
SUBSCRIBERS: 212-553-1653

MOODY'S ASSIGNS A2 RATING TO SENIOR UNSECURED NOTES TO BE ISSUED BY
VERIZON WIRELESS UNDER RULE 144A

First-Time Rating

New York, December 10, 2001 -- Moody's Investors Service has assigned a rating of A2 to the proposed issue of senior unsecured notes to be issued by Cellco Partnership, d/b/a Verizon Wireless, under Rule 144A. This rating considers Verizon Wireless' many operational and competitive strengths, which should support continued strong internal cash flow growth over at least the next few years. In addition, Moody's believes that Verizon Wireless is committed to doing an IPO, as soon as practicable, in order to increase its financial flexibility. However, Moody's anticipates that the increasingly competitive nature of the domestic wireless business will keep capital spending high and exert pressure on margins. As importantly, recent investments, (including our expectation that Verizon Wireless will be successful in obtaining the Nextwave spectrum for which it bid \$8.8B), and/or the likelihood for additional spectrum and/or asset purchases, could cause debt levels to increase significantly in the near-term, especially if the IPO is further delayed. Furthermore, should Vodafone exercise its \$20.0B put, debt levels at Verizon Wireless could remain elevated for quite some time. The rating outlook is negative as a result of the financial overhang created by the uncertainty of the IPO and the potential for Vodafone's put to be satisfied by Verizon Wireless with cash.

This action represents the first time Moody's has rated the debt of Cellco Partnership (Verizon Wireless), a joint venture between Verizon Communications, rated A1/negative outlook for long-term debt and Vodafone Group Plc, rated A2.

Verizon Wireless, by far the largest wireless provider in the U.S. (in terms of customers, revenues and cash flow) and 55% owned by Verizon, is expected to significantly grow its operating cash flow as it capitalizes

on continued strong demand growth, the high operating leverage of the business, and its low cost structure. Subscriber growth in the U.S. remains strong and is expected to be fueled by continued strong demand growth for wireless voice services and by increasing demand for wireless data services. Incremental data revenues, while small, should grow strongly.

The largest national network footprint, covering 80% of the population (91% with Nextwave, Price and Dobson) minimizes roaming costs which is increasingly important given the trend toward national service offerings. Today the network of Verizon Wireless covers 49 of the top 50 and 97 of the top 100 most populated metropolitan areas of the US. In addition, excellent distribution channels including a high percentage of low cost direct distribution, improving operating efficiencies --- since April 2000, 5 internal financial reporting systems have been combined into 1, the number of billing systems has been reduced from 13 to 8, and NOC centers have been reduced from 7 to 3 ---, and strong purchasing power are expected to allow the company to offset, at least somewhat, accelerating competitive challenges. Today, the company has the lowest churn (2.2%) and highest operating cash flow margins (36%) of the national cellular providers.

In addition, its cost structure stands to benefit in the future from a network that is based on the most efficient and economical digital standard, CDMA. Moody's believes that the network upgrade path necessary for offering third generation ("3G") wireless services will be easiest and least costly for CDMA providers compared to GSM and TDMA because of lower spectrum requirements and favorable migration paths. As an added benefit, an intermediate upgrade to 2.5G (1XRTT) promises to double voice capacity for a relatively modest investment that Moody's estimates at between \$3 and \$5 per POP. Despite the spectrum efficiencies of CDMA, Verizon Wireless has assembled a robust spectrum portfolio. In the top 50 markets, including Nextwave, Verizon Wireless would own an average of 38MHz based on a weighted average of spectrum per POP .

Offsetting these strengths are several concerns. To capitalize on the longer-term potential of the developing wireless data opportunity and to stay competitive in the wireless voice market, Verizon Wireless is seeking to expand both its coverage and spectrum ownership. In this regard, the company spent \$8.8B in the Nextwave re-auction, offered to purchase Price Communications for about \$2.1B (incl. \$500M of assumed debt) and entered into agreements to purchase certain Dobson operations for about \$500M in cash. While additional acquisitions or spectrum purchases cannot be ruled out, Moody's anticipates that an IPO, when completed, will establish a currency for at least some of the expected activity in this area.

Verizon Wireless expects to hold an IPO in the 1st half of 2002 for a portion of the company with the proceeds (which Moody's estimates at a minimum of \$5.0B) being used to pay down short-term debt. Also, around mid-year, the company will likely be required to make the \$7.0B payment final payment for the Nextwave spectrum.

Another concern relates to the increasingly competitive landscape for providing national wireless voice and data services. Verizon Wireless operates in a highly competitive segment of the telecom industry with low switching costs and currently little product differentiation. The pressure to expand its service offerings and upgrade the network coincides with competitive pressures on the price of service. Moody's believes lower revenues per user coupled with increased network usage could lead to margin erosion. The ratings also incorporate the company's capital program needs, estimated to average about \$5.0B annually, as it builds out its network (including the Nextwave and other properties) and upgrades its plant to enable high speed data services.

Another risk relates to Vodafone's \$20B put option. Under the terms of an Investment Agreement, the partnership may be required to repurchase, at market value, for cash, up to \$20.0B of Vodafone's interest in the partnership in two phases. The first phase, exercisable in July of 2003 and/or July 2004, permits Vodafone to require the partnership to repurchase from it up to \$10.0B of its interest in the partnership. The second phase, exercisable in July 2005, July 2006 and/or July 2007, permits Vodafone to require the partnership to repurchase from it up to \$20.0B, less than amount put in Phase I, of Vodafone's interest in the partnership. Under the agreement, Verizon Communications, has the right to obligate itself, rather than the partnership, to purchase some or, under certain circumstances, all of Vodafone's puts. And, while Verizon Communications will have the right to deliver cash or shares of Verizon Communications common stock, at its option, the partnership will be required to pay cash. Furthermore, Vodafone has the option to require the partnership to incur up to \$7.5B of debt, during Phase II, and distribute cash to Vodafone. The potential impact of this put on the balance sheets of both Verizon Communications and Verizon Wireless is significant. Consequently, Moody's anticipates that the negative outlooks on both Verizon Communications and Verizon Wireless may continue until a degree of certainty develops around the execution and/or consideration to be paid should the puts be exercised.

Verizon Wireless' current capitalization includes about \$15B in debt of which \$10B is a shareholder loan from Verizon Communications and \$5B is a bank facility. All debt is pari-passu. About \$7.6B of the shareholder loans are demand notes with no stated maturity that pay cash interest at the rate that it costs Verizon Global Funding (VZGF) to borrow the funds and about \$2.4B matures in 2009 and is also at VZGF cost of money. Under

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terms of an agreement with Verizon Global Funding, Verizon Wireless can borrow on an uncommitted basis.

Verizon Wireless is the largest wireless communications company in the United States and is headquartered in Bedminster, N.J.

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Verizon Communications Inc. Outlook Revised To Negative, Ratings Affirmed

Rosemarie Kalinowski, New York (1) 212-438-7841

NEW YORK (Standard & Poor's) March 22, 2002--Standard & Poor's said today that it revised its outlook on Verizon Communications Inc. and its affiliates to negative from stable based on the company's higher-than-expected debt leverage primarily due to additional wireless spectrum purchases and the \$1.7 billion deposit with the FCC for licenses won in the January 2001 auction. Another contributing factor was less-than-expected growth in EBITDA due to the slowing economy and wireless substitution.

Simultaneously, Standard & Poor's has affirmed its single-'A'-plus corporate credit rating on N.Y.-based Verizon and the ratings of its affiliates. As of Dec. 31, 2001, total debt outstanding was about \$64 billion.

Fourth-quarter 2001 reported revenue grew less than 1% compared with the same quarter of 2000 and was essentially flat compared with the third quarter of 2001. This was attributable to the decline in wireline access lines and lower wireless net adds than previously expected. The company's local wireline business segment has been affected by the slowing economy, the effect of the September 11 disaster, and wireless and e-mail substitution. Wireless net adds have been affected by the slowing economy and higher industry penetration levels.

Growth in overall revenue will be dependent on the strength of the wireless business from increased penetration and enhanced data services, continued success in obtaining long-distance approval, and increased penetration of digital subscriber line (DSL) services.

Uncertainty exists as to the NextWave licenses won in the January 2001 FCC auction. The Supreme Court has agreed to hear the FCC's appeal of the U.S. Court of Appeals ruling that returned the licenses to NextWave. Action by the Supreme Court will likely not occur until 2003. Furthermore, Verizon Wireless has requested the FCC to return its \$1.7 billion deposit on the licenses. Verizon Wireless is expected to have sufficient spectrum capacity for the next 18 months - 24 months to execute its 2.5 generation strategy.

Improvement in cash flow measures and reduction in debt levels will be needed to maintain the current rating. However, Verizon has commenced a debt reduction strategy and recently announced that net proceeds of about \$2.8 billion from the sale of access lines will be applied to debt reduction. If

debt to EBITDA will be below 2.0x during the next year, the outlook can be revised to stable.

A complete list of the ratings is available to RatingsDirect subscribers at www.ratingsdirect.com, as well as on Standard & Poor's public Web site at www.standardandpoors.com under Ratings Actions/Newly Released Ratings.

Credit Profile:

STANDARD &POOR'S	RATINGS DIRECT

Research:

Return to Regular Format

BULLETIN: Verizon to Have 85% of Deposit for NextWave Spectrum Returned

Publication date: 28-Mar-2002

Analyst: Rosemarie Kalinowski, New York (1) 212-438-7841

Standard & Poor's said today that the FCC's decision to return 85% of deposits made by cellular carriers for licenses won in the January 2001 auction has no impact on Verizon Communications Inc.'s (A+/Negative/--) credit rating or outlook at this time because of the uncertainty regarding Verizon's ultimate obligation to pay the total \$8.7 billion it bid in the auction. The amount of the deposit to be returned to Verizon should be about \$1.5 billion. The FCC has stated that the bidders in the auction are responsible for the full amount, if the FCC wins its case against NextWave Telecom Inc., now pending before the Supreme Court. However, given the decline in wireless asset values since the auction, full payment of the licenses will continue to be discussed with the FCC.

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Attachment D

**TABLE: Time To First Tender Notice
for All Radio Spectrum Auctions***

Auction #	Auction Closing Date**	Date of First Tender Notice*	Elapsed Days
1	August 2, 1994	September 29, 1994	58
3	November 9, 1994	January 23, 1995	75
4	March 13, 1995	June 23, 1995	102
5	May 8, 1996	September 17, 1996	132
7	April 15, 1996	August 12, 1996	119
10	July 17, 1996	November 1, 1996	107
11	January 15, 1997	April 28, 1997	103
12	January 22, 1997	May 30, 1997	128
14	April 28, 1997	July 21, 1997	84
16	December 9, 1997	March 6, 1998	87
17	March 26, 1998	June 8, 1998	74
18	October 23, 1998	January 22, 1999	91
20	December 16, 1998	May 21, 1999	156
21	March 8, 1999	June 8, 1999	92
22	April 20, 1999	June 11, 1999	52
23	May 14, 1999	August 9, 1999	87
24	July 1, 1999	September 9, 1999	70
26	March 6, 2000	May 5, 2000	60
30	May 10, 2000	August 16, 2000	98
33	September 25, 2000	December 6, 2000	72
34	September 6, 2000	November 17, 2000	72
36	December 7, 2000	February 14, 2001	69
38	February 22, 2001	April 18, 2001	55
39	June 15, 2001	September 4, 2001	81
40	December 11, 2001	May 31, 2002	171
41	October 18, 2001	January 24, 2002	98
42	November 30, 2001	March 8, 2002	98
43	January 22, 2002	April 5, 2002	73
Average:			91.6
			3.1
			Months
Median:			87.0
			2.9
			Days, or
			Months

* Does not include auctions for which Universal Licensing System records are unavailable. This chart has been revised since it was originally filed with this Court on April 5, 2002. First, data for Auctions 40, 42, and 43 was added because this data has become newly available. Second, Auctions 6, 25, and 28 were removed because data for these auctions is not available on the ULS. Third, Auctions 12 and 20 were added because records for these auctions are available on the ULS. Finally, the dates of first tender notice for Auctions 1, 3, 17, 22, 30, 33, 36, and 39 were revised as earlier tender notices for each auction have been located.

** All dates obtained from publicly available FCC Public Notices accessible through the FCC-maintained Universal Licensing System database, Auctions Division homepage, and Wireless Telecommunications Bureau public documents database, respectively accessible at: <http://wireless.fcc.gov/uls/>, <http://wireless.fcc.gov/auctions/>, and <http://wireless.fcc.gov/releases.html>.

Attachment E

**TABLE: Time To First Tender Notice for
All Broadband PCS Auctions (Excluding Auction No. 35)**

Auction #	Auction Closing Date*	Date of First Tender*	Elapsed Days	
22	April 20, 1999	June 11, 1999	52	
11	January 15, 1997	April 28, 1997	103	
10	July 17, 1996	November 1, 1996	107	
5	May 8, 1996	September 17, 1996	132	
4	March 13, 1995	June 23, 1995	102	
Average:			99.2	Days, or
			3.3	Months
Median:			103.0	Days, or
			3.4	Months

Attachment F

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

CELLCO PARTNERSHIP d/b/a
VERIZON WIRELESS,

Plaintiff,

v.

UNITED STATES OF AMERICA,

Defendant.

)
)
)
)
) No. 02-280C
) Judge Sarah L. Wilson
)
)
)
)
)
)
)

**MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF
PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT**

Cellco Partnership d/b/a Verizon Wireless ("Verizon Wireless") submits this Memorandum of Points and Authorities in Support of its Motion for Summary Judgment on Counts One and Three of the Complaint. Verizon Wireless requests that this Court grant summary judgment on these claims, finding that there are no genuine issues of material fact and that Verizon Wireless is entitled to judgment as a matter of law. In the alternative, should this Court determine that Verizon Wireless is not entitled to summary judgment on the current record, Verizon Wireless requests a hearing to introduce evidence in support of its position.

Defendant United States of America has breached a contract with Verizon Wireless by failing to deliver in a timely manner spectrum licenses won by Verizon Wireless in an auction, Auction 35, conducted by the Federal Communications Commission ("Commission" or "FCC"). Auction 35 reaucted certain licenses the FCC had repossessed from previous licensees. In Auction 35, which ended in January 2001, Verizon Wireless was the winning bidder for numerous repossessed spectrum licenses. As the FCC itself has affirmed, its auction process results in a contract that requires prompt delivery of the licenses after the close of the auction.

Verizon Wireless performed every obligation it had under the contract to receive delivery of the spectrum licenses, including depositing 20 percent of the purchase price—over \$1.7 billion—with the FCC. In June 2001, the U.S. Court of Appeals for the D.C. Circuit ruled that the FCC's repossession of licenses from a prior licensee violated the Bankruptcy Code, and ordered the FCC to return them to the prior licensee. On August 31, 2001, the FCC did so. The Supreme Court has agreed to review the D.C. Circuit's decision, but the FCC will not be able to deliver the contested licenses to the Auction 35 winners until at least 2003, if ever.

After all efforts at settlement failed, in January 2002 the Auction 35 winners filed an emergency request for the return of their deposits—over \$3 billion, which the FCC had been holding interest-free for almost a year. On March 5, 2002, Verizon Wireless informed the FCC that it was exercising its right to rescind its auction contract for failure to deliver the licenses within a reasonable time after the close of the auction, and it requested a refund of its deposit. However, the FCC refused to refund all of Verizon Wireless's deposit, asserting—contrary to the auction contract's express terms—that the auction agreement remained enforceable, and that the winners would be required to accept the spectrum licenses at the prices struck in January 2001 *whenever* the FCC regained possession of the licenses. The FCC retained 3 percent of the total winning bids—approximately \$261 million from Verizon Wireless—as a potential default penalty in the event that the Auction 35 winners refused to accept delivery of the licenses. These breaches of contract have caused Verizon Wireless substantial economic injury, as Verizon Wireless will show in the damages phase of these proceedings.

The FCC's failure to deliver the licenses in a timely manner is a material breach of the auction contract, entitling Verizon Wireless to rescission of the contract and refund of its entire down payment. In the alternative, even if the unavailability of the licenses for timely delivery

constituted the failure of a condition precedent to the FCC's duty to perform, the FCC's failure to perform entitles Verizon Wireless to rescission of the contract and restitution.

STATEMENT OF THE QUESTIONS AT ISSUE

1. Has the FCC materially breached its Auction 35 contract with Verizon Wireless by failing timely to deliver the licenses for which Verizon Wireless was the winning bidder, giving Verizon Wireless the right to rescind the contract and obtain a full refund of its down payment?

2. In the alternative, does the unavailability of the licenses for timely delivery constitute the failure of a condition precedent to the FCC's duty to perform, entitling Verizon Wireless to rescind the contract and obtain a full refund of its down payment?

STANDARD FOR SUMMARY JUDGMENT

Summary judgment shall be rendered when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. RCFC 56; *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986). The moving party must demonstrate the absence of any genuine issue of material fact and can do so if "there is an absence of evidence to support the nonmoving party's case." *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986).

STATEMENT OF THE CASE

A. Purpose and Design of the Spectrum Auction System

In 1993, Congress authorized the FCC to use auctions to distribute wireless spectrum licenses. Dissatisfied with the protracted delays, uncertainty, and speculation engendered by the FCC's prior comparative hearing and lottery processes for allocating spectrum,¹ Congress mandated the design of an auction system that would promote "the development and *rapid*

¹ See H.R. Rep. No. 111, 103d Cong. 248 (1993) (describing Congress's intent to avoid "unproductive speculation" by applicants who "had no intention to build or operate a system using the spectrum").

deployment of new technologies, products, and services . . . *without administrative or judicial delays.*” 47 U.S.C. § 309(j)(3)(A) (emphasis added). Accordingly, the Commission designed auction rules to “award licenses quickly to those parties who value them most highly and who are therefore most likely to introduce service rapidly to the public.”² FCC regulations require winning bidders to submit all information necessary to determine their qualifications within 10 days of the close of the auction, and all challenges must be submitted no more than 10 days thereafter. *See* 47 C.F.R. §§ 1.2107(c), 1.2108(b). Once a winning bidder has made the required deposit and established its qualifications, the FCC must promptly tender the licenses. “[T]he Commission becomes bound to issue a license to the winning bidder if it is determined to be qualified as a licensee pursuant to the Commission’s rules and procedures.”³

The FCC has explained that speed is essential to ensure that, as Congress intended, auctions function properly to identify the spectrum’s most efficient immediate use:

Since a bidder’s abilities to introduce valuable new services and to deploy them quickly, intensively, and efficiently increase the value of a license to a bidder, an auction design that awards licenses to those bidders with the highest willingness to pay tends to promote the development and rapid deployment of new services in each area and the efficient and intensive use of the spectrum.⁴

An auction serves this function only if the buyer is ready to use the spectrum immediately and the seller is ready to deliver it promptly for current use. For this reason, Congress prohibited bidders from “stockpiling or warehousing of spectrum” for speculative purposes. 47 U.S.C.

² Fifth Report and Order, *Implementation of Section 309(j) of the Communications Act—Competitive Bidding*, 9 FCC Rcd 5532, 5535 ¶ 5 (1994) (“Fifth Competitive Bidding Order”).

³ Second Order on Reconsideration of the Second Report and Order, *Amendment of the Commission’s Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licensees*, 14 FCC Rcd 6571, 6581 ¶ 17 n.66 (1999) (“Installment Payment Order”).

⁴ Second Report and Order, *Implementation of Section 309(j) of the Communications Act—Competitive Bidding*, 9 FCC Rcd 2348, 2361 ¶ 71 (1994) (internal quotation marks and citation omitted).

§ 309(j)(4)(B). Instead, auction winners are required to deploy the purchased spectrum quickly, meeting “performance requirements” to ensure “rapid deployment” of services, subject to “deadlines and penalties for performance failures.” *Id.*

Consistently with Congress’s goal of promoting the rapid deployment of new services, the FCC’s established practice has been to deliver licenses promptly after the close of an auction. The time from close of auction to the FCC’s first tender of licenses has averaged just over three months, and in all cases the first tender was less than six months from the auction’s close.⁵

B. Auctions of Contested Spectrum

The FCC sometimes comes into possession of spectrum licenses that are contested—for example, when the FCC reclaims a license due to a violation of Commission rules and the licensee challenges the FCC’s action. When the FCC reauctions such licenses, it has adopted a policy of severing the issue of immediate use from the issue of ultimate ownership—offering bidders the right to immediate use of the spectrum, subject to an explicit understanding that, if the challenger ultimately proves successful, the licenses might have to be surrendered.⁶ The FCC discussed this issue in depth in Auction 22, where it reaucted licenses that were the

⁵ For all FCC radio spectrum auctions (other than Auction 35) for which public records are available—28 auctions in total—the average time from close of the auction to tender of the first licenses has been 91.6 days, or 3.1 months; the median has been 87 days, or 2.9 months. *See* Table: Time to First Tender Notice for All Radio Spectrum Auctions, App. 479. Similarly, for the five other broadband PCS auctions the FCC has held since 1995, the average time from the close of the auction to tender of the first licenses was 99.2 days, or 3.3 months. *See* Table: Time to First Tender Notice for All Broadband PCS Auctions, App. 477.

⁶ *See* Order, *Northcoast Communications, L.L.C.*, 16 FCC Rcd 15637, 15640-41 ¶ 6 (2001) (“Northcoast Order”) (“As a general matter, the Commission does not defer grant of license applications until pending proceedings are complete. Instead, in order to serve the public interest in prompt implementation of telecommunications services, the Commission conditions the grant of such licenses on the outcome of pending proceedings.”).

subject of pending proceedings. In response to bidders' questions, the FCC clarified that the grant of the license would not await "final adjudication of the pending proceeding":

[The] license will be granted at the close of the auction in order to serve the public interest in prompt implementation of [wireless] service and ... the grant of such a license will be conditioned on the outcome of pending proceedings.... [Such a grant] may be undone if the basis for the grant is reversed as a result of the outcome of the proceeding.⁷

C. Background of Auction 35

In the mid-1990s, NextWave Personal Communications, Inc. ("NextWave") and Urban Communicators PCS ("UrbanCom") were winning bidders for wireless spectrum. They soon defaulted on their payments, and both filed for bankruptcy. The FCC took the position that the licenses automatically canceled when NextWave and UrbanCom failed to make their installment payments. *See NextWave Personal Communications, Inc. v. FCC*, 254 F.3d 130, 141-42 (D.C. Cir. 2001). NextWave and UrbanCom disputed this position before the FCC and in litigation.

The FCC decided to reactivate the NextWave and UrbanCom licenses while those disputes were pending. The FCC explained that it "[i]nclude[d] contested licenses in the auction ... to fulfill the Commission's statutory mandate to *hasten* the development and deployment of new technologies and services and to promote competition for the benefit of the public."⁸ NextWave sought reconsideration of the FCC's reactivation notice on the ground that cancellation of its licenses was unlawful. *See NextWave*, 254 F.3d at 139. After the Commission denied its

⁷ Public Notice, *Auction of C, D, E, & F Block Broadband PCS Licenses Notice and Filing Requirements*, 13 FCC Rcd 24540, 24544-45 (1998) ("Auction 22 Notice").

⁸ Public Notice, *C and F Block Broadband PCS Spectrum Auction*, 15 FCC Rcd 17251, 17256 (2000) ("Sept. 6, 2000 Notice") (emphasis added); *accord* Public Notice, *C and F Block Broadband PCS Spectrum Auction*, 15 FCC Rcd 19485, 19494 (2000) ("Oct. 5, 2000 Notice"); Public Notice, *Auction of Licenses for C and F Block Broadband PCS Spectrum Auction*, 15 FCC Rcd 22466, 22468-69 (2000) ("Nov. 17, 2000 Notice").

petition,⁹ NextWave asked the D.C. Circuit to stay the reauction pending review of the license cancellation. In opposing the motion, the FCC represented that “the auction will be conducted subject to pending litigation” and that “if NextWave prevails before this Court it will get its licenses back.”¹⁰ “In the meantime,” the Commission said, “proceeding with the auction . . . will enable new licensees to provide service to the public *far sooner* than would be possible were the Commission required to wait for the outcome here.”¹¹ The FCC noted that “potential bidders may be severely disadvantaged if they were required to wait for the final resolution of NextWave’s litigation efforts before even commencing the bidding process. In the fast-evolving wireless market, *an indeterminate delay to await the final outcome of litigation might be a significant, or even crucial blow to future licensees’ ability to compete.*”¹² The D.C. Circuit denied the stay.¹³

D. The Auction 35 Contract Between Verizon Wireless and the United States

In a series of Public Notices issued in the months before Auction 35, the FCC detailed the auction procedures and informed bidders of certain risks connected with the purchase of contested spectrum. In a general section entitled “Due Diligence Information,” the FCC drew bidders’ attention to pending administrative and judicial proceedings. The FCC cautioned that the “[r]esolution of these matters could have an effect on the availability of spectrum included in

⁹ See Order on Reconsideration, *Auction of C and F Block Broadband PCS Licenses; NextWave Personal Communications, Inc. and NextWave Power Partners Inc. Petition for Reconsideration*, 15 FCC Rcd 17500 (2000) (“NextWave Reconsideration Order”).

¹⁰ Opposition by the FCC to NextWave’s Motion for a Stay Pending Judicial Review or for Expedited Consideration at 9, *NextWave Personal Communications, Inc. v. FCC* (D.C. Cir. Oct. 6, 2000) (Nos. 00-1402 & 00-1403) (“FCC Stay Opposition”).

¹¹ *Id.* at 1 (emphasis added).

¹² *Id.* at 19 (emphasis added).

¹³ See Order at 1, *NextWave Personal Communications, Inc. v. FCC* (D.C. Cir. Nov. 13, 2000) (Nos. 00-1402 & 00-1403).

Auction 35 and the auction is subject to such matters,” and that bidders were “solely responsible for identifying associated risks, and investigating and evaluating the degree to which such matters may affect their ability to bid on or otherwise acquire licenses in Auction No. 35.”¹⁴

Immediately following the due diligence discussion, in a separate section entitled “Clarification of Payment Issue Relating to Licenses Subject to Pending Proceedings,” the FCC defined the scope of the risk that pending proceedings would pose to the bidders:

As noted above, potential bidders should be aware that certain of the licenses included in Auction No. 35 are or may become the subject of Commission or judicial proceedings initiated by parties claiming to have continuing interests in the licenses, despite their failure to meet payment obligations. *This Public Notice clarifies that the Commission will return the payments made by winning bidders of licenses in Auction No. 35 in the event that such bidders are subsequently required to surrender licenses won to prior applicants or license holders as a result of final determinations reached in pending proceedings.*¹⁵

The Commission thus made plain that bidders would pay for and receive the licenses immediately after the auction, subject to the identified risk of possible “surrender” of the licenses and refund of their payments if the FCC were required to return the licenses to NextWave.

The Public Notices further assured bidders that “the Commission will return payments made by winning bidders if licenses bid for are later determined to be unavailable due to a

¹⁴ Sept. 6, 2000 Notice, 15 FCC Rcd at 17256 (emphasis omitted); Oct. 5, 2000 Notice, 15 FCC Rcd at 19493; Nov. 17, 2000 Notice, 15 FCC Rcd at 22468.

¹⁵ Sept. 6, 2000 Notice, 15 FCC Rcd at 17256 & n.16 (emphasis added and citation omitted); accord Oct. 5, 2000 Notice, 15 FCC Rcd at 19493-94 & n.22; Nov. 17, 2000 Notice, 15 FCC Rcd at 22468-69 & n.6.

subsequent court action.”¹⁶ The FCC referred bidders to its prior statements on contested auctions, including those made in Auction 22,¹⁷ and explained:

Including contested licenses in the auction helps to fulfill the Commission’s statutory mandate to hasten the development and deployment of new technologies and services and to promote competition for the benefit of the public. Returning payments to winning bidders if licenses won are later determined to be *unavailable due to subsequent resolution of other proceedings* furthers these vital public interest goals by reducing uncertainty in the licensing process and encouraging auction participants to bid on licenses regardless of whether they are subject to pending proceedings. . . . We note that winning bidders of licenses subject to pending proceedings are still required to meet the normal payment and construction schedules established by the Commission.¹⁸

The FCC thus committed to return any “payments” made by bidders—including both the final payments upon delivery of the licenses and any down payments made in anticipation of their receipt—in the event that the licenses became “unavailable.” The FCC also made explicit that winning bidders would have possession of auctioned licenses while any litigation was pending and would, as a result, be “required to meet the normal payment and construction schedules.”

Auction 35 began in December 2000 and concluded in January 2001. Verizon Wireless was the winning bidder for 67 licenses formerly held by NextWave and 13 licenses formerly held by UrbanCom.¹⁹ Its bids for these 80 licenses totaled \$8,698,982,000, of which \$8,546,793,000—or more than 98%—was for the 67 NextWave licenses. On February 12, 2001, Verizon Wireless fulfilled the requirements for delivery of the licenses by depositing 20 percent

¹⁶ Sept. 6, 2000 Notice, 15 FCC Rcd at 17256 & n.16; *accord* Oct. 5, 2000 Notice, 15 FCC Rcd at 19493-94 & n.22; Nov. 17, 2000 Notice, 15 FCC Rcd at 22468-69 & n.6.

¹⁷ Sept. 6, 2000 Notice, 15 FCC Rcd at 17257 n.18 (citing Auction 22 Notice, 13 FCC Rcd 24540, 24544); *see id.* at 17256 n.16 (citing intervening Public Notice that itself relies on the Auction 22 notice).

¹⁸ Sept. 6, 2000 Notice, 15 FCC Rcd at 17256-57 (emphasis added); *accord* Oct. 5, 2000 Notice, 15 FCC Rcd at 19494; Nov. 17, 2000 Notice, 15 FCC Rcd at 22468-69.

¹⁹ *See* Public Notice, *C and F Block Broadband PCS Auction Closes*, 16 FCC Rcd 2339 (2001).

of its winning bid—\$1,739,796,400—and submitting “long-form applications” showing its compliance with statutory and regulatory criteria.²⁰ On February 27, 2001, the FCC accepted the applications and announced that challenges to the applications were due on March 9, 2001.²¹

E. The FCC’s Failure To Deliver the Licenses

Although no one challenged Verizon Wireless’s application, on March 9, NextWave asked the FCC to defer delivery of the licenses pending the D.C. Circuit’s decision on NextWave’s challenge to the cancellation of its licenses.²² After oral argument in the D.C. Circuit—which led observers to believe that NextWave would prevail in its appeal²³—Verizon Wireless indicated that it did not oppose NextWave’s request. It explained that, because the D.C. Circuit’s imminent ruling “could result in the award of the same licenses to NextWave”—in which case the Commission would be forced to “cancel the just-issued licenses and refund all payments (as it has expressly committed to do)” —granting the licenses before such a ruling would be “pointless.”²⁴ The FCC did not rule on NextWave’s petition, but it did not deliver any of the NextWave or UrbanCom licenses to the Auction 35 winners.

On June 22, 2001, the D.C. Circuit held that “the Commission violated the provision of the Bankruptcy Code that prohibits governmental entities from revoking debtors’ licenses solely

²⁰ See 47 C.F.R. §§ 1.2112(b), 24.709(c)(2)(i).

²¹ See Public Notice, *C and F Block Broadband Personal Communications Services (PCS) Auction*, 16 FCC Rcd 4742, 4742 (2001).

²² Petition to Defer or, in the Alternative, to Condition Grant, *Applications of 3DL Wireless et al.* (FCC Mar. 9, 2001) (DA No. 01-520); Petition to Defer or, in the Alternative, to Condition Grant (FCC Mar. 9, 2001) (Report No. AUC-35).

²³ See *Court Eyes Balance Between Bankruptcy Code, Communications Law*, Communications Daily, 2001 WL 5052779 (Mar. 16, 2001).

²⁴ Verizon Wireless’ Supplemental Comments, Request To Defer Grant of Application and Request for Permit-But-Disclose Ex Parte Procedures at 3-4, *Application of Cellco Partnership d/b/a Verizon Wireless* at 3 (FCC Apr. 24, 2001) (DA 01-520).

for failure to pay debts dischargeable in bankruptcy.” *NextWave*, 254 F.3d at 133. It therefore “reverse[d]” the notice of reauction and remanded for further proceedings. *Id.* at 156.

The FCC moved in the D.C. Circuit to stay the mandate pending the filing of a petition for a writ of certiorari. The FCC acknowledged that, “[i]f the Commission were required to reinstate NextWave’s licenses as a result of the mandate, the fate of Auction 35 is placed in considerable doubt: winning bidders might ... insist that the Commission can no longer require them to adhere to their original promise to pay for their licenses in full upon issuance.”²⁵ The court denied the motion,²⁶ and the D.C. Circuit’s mandate issued on August 30, 2001. The next day, the FCC returned to NextWave the licenses it had previously canceled and included in Auction 35.²⁷ Although the FCC recognized the need to “address the status of affected Auction No. 35 license applications and associated payments,”²⁸ it took no steps to do so.

The FCC’s failure to deliver the licenses to Verizon Wireless has forced it to take second-best measures to alleviate capacity constraints and meet customer demand. The costs of those measures would be stranded if Verizon Wireless were later required to accept the Auction 35 spectrum.²⁹

²⁵ Motion To Stay the Mandate Pending the Filing of a Petition for a Writ of Certiorari at 8-9, *NextWave Personal Communications, Inc. v. FCC* (D.C. Cir. Aug. 6, 2001) (Nos. 00-1402 & 00-1403) (“FCC Stay Motion”).

²⁶ See Order, *NextWave Personal Communications, Inc. v. FCC* (D.C. Cir. Aug. 23, 2001) (Nos. 00-1402 & 00-1403).

²⁷ See Public Notice, *Wireless Telecommunications Bureau Announces the Return to Active Status of Licenses to NextWave Personal Communications Inc. and NextWave Power Partners Inc.*, 16 FCC Rcd 15970 (2001).

²⁸ *Id.*

²⁹ See Declaration of Richard J. Lynch at ¶¶ 4-7 (Exhibit 5 to Verizon Wireless’s Unopposed Motion to Expedite, *Cellco Partnership d/b/a Verizon Wireless v. FCC* (D.C. Cir. Apr. 17, 2002) (Nos. 02-1110 & 02-1111)) (“Lynch Decl.”).

F. The Settlement Negotiations and Verizon Wireless's Refund Petition

From September through November 2001, in the hope of acquiring the Auction 35 licenses without further delay, Verizon Wireless negotiated with the FCC, NextWave, and other winning bidders to settle the fate of the licenses. On November 15, 2001, the parties reached a settlement agreement that might have cured the FCC's breach of the auction contract; however, that agreement was contingent on the passage of implementing legislation no later than December 31, 2001.³⁰ In his testimony urging Congress to adopt such legislation, FCC Chairman Powell acknowledged that, "under [the D.C. Circuit's] ruling, and the mandate that was issued, NextWave has rightful claim to its licenses, and the Commission's re-auction, with its glittering bids of \$16 billion[,] has been largely arguably nullified."³¹ However, Congress failed to pass legislation by the deadline, and the settlement agreement terminated.

On January 4, 2002, Verizon Wireless and 12 other Auction 35 winners filed a petition with the FCC demanding refund of the more than \$3.2 billion the FCC had been holding without interest since February 2001.³² The petition requested relief by January 18, 2002, to underscore the need for prompt agency action. The FCC took no action by that date.

On February 5, 2002, Verizon Wireless petitioned the D.C. Circuit to enforce the *NextWave* mandate. The petition sought an order directing the FCC to refund the full amount of Verizon Wireless's down payment for the NextWave licenses and confirming that Verizon

³⁰ See Settlement Agreement by and among the United States of America, the Federal Communications Commission, NextWave Telecom Inc. and Certain Affiliates and Participating Auction 35 Winning Bidders, ¶ 2, Nov. 15, 2001 ("Settlement Agreement").

³¹ *The Settlement Between the U.S. Government and NextWave Telecom Inc. to Resolve Disputed Spectrum Licenses: Hearing Before the Subcomm. on Telecommunications and the Internet of the House Comm. on Energy and Commerce*, 107th Cong. 13 (2001) (statement of Michael K. Powell, Chairman, Federal Communications Commission) ("Powell Testimony").

³² See Joint Request for Immediate Refund of Auction No. 35 Down Payments for NextWave Licenses, *Applications of 3DL Wireless, LLC, et al.* (FCC Jan. 4, 2002).

Wireless's payment obligations for those licenses had been extinguished.³³ The court denied the petition, stating that the relief sought "does not fall within the court's mandate" and that, "[a]ccordingly, the court has not reached the substantive merits of the petition."³⁴

G. The Supreme Court's Grant of Certiorari and the Impossibility of Delivery of the Licenses in the Foreseeable Future

While the parties were negotiating, the FCC asked the Supreme Court to review the D.C. Circuit's decision.³⁵ On March 4, 2002, the Supreme Court granted the FCC's petition for a writ of certiorari.³⁶ The FCC has acknowledged that the Supreme Court's decision to hear the *NextWave* case does not cure the fact that "the former NextWave licenses are not currently available for use by" Verizon Wireless.³⁷ The FCC's inability to deliver the licenses to Verizon Wireless will persist for the foreseeable future. The Supreme Court will not hear oral argument in *NextWave* until October 8, 2002, and is unlikely to decide the case before 2003. Moreover, any Supreme Court ruling in favor of the FCC would be followed by further proceedings in the D.C. Circuit on NextWave's remaining legal challenges, which previously were reserved by that court. *See NextWave*, 254 F.3d at 156. Thus, even if the FCC ultimately prevailed, it would not,

³³ *See* Petition To Enforce the Mandate, *NextWave Personal Communications Inc. v. FCC* (D.C. Cir. Feb. 5, 2002) (Nos. 00-1402 & 00-1403).

³⁴ Order, *NextWave Personal Communications, Inc. v. FCC* (D.C. Cir. Mar. 1, 2002) (Nos. 00-1402 & 00-1403).

³⁵ *See* Petition for a Writ of Certiorari, *FCC v. NextWave Personal Communications Inc.* (U.S. Oct. 19, 2001) (No. 01-653) ("Petition for a Writ of Certiorari"). Although Verizon Wireless also initially filed a petition for certiorari, it withdrew that petition four months later when it became clear that the Supreme Court's disposition of the case, if it chose to grant certiorari, would be unlikely to occur until 2003. *See* Motion To Dismiss Petition for a Writ of Certiorari, *Cellco Partnership d/b/a Verizon Wireless v. NextWave Personal Communications, Inc.* (U.S. Feb. 1, 2002) (No. 01-654).

³⁶ *See FCC v. NextWave Personal Communications, Inc.*, 122 S. Ct. 1202 (2002).

³⁷ *See* Order, *Requests for Refunds of Down Payments Made in Auction No. 35*, 17 FCC Rcd 6283, 6291-92 ¶ 16 (2002) ("Partial Refund Order").

until late in 2003 at the earliest (and most likely significantly later), have the legal authority to deliver to Verizon Wireless the licenses contracted for in Auction 35 in January 2001.³⁸

H. Verizon Wireless's Election To Rescind the Auction Contract Due to Nondelivery

On March 5, 2002, Verizon Wireless formally notified the FCC by letter of its election to rescind the auction contract. The letter stated that it “has been over thirteen months since conclusion of the auction—well beyond any reasonable time frame in which the government had the obligation to deliver the licenses to the winning bidder.”³⁹ Verizon Wireless’s bids “assumed the ability to use the licenses, generate revenue, and meet capacity demands during 2001 and going forward.”⁴⁰ Because of the FCC’s failure to deliver the licenses, however, “Verizon Wireless has been unable to derive any value from them throughout 2001 and has had to incur costs in making alternative arrangements to satisfy capacity demands.”⁴¹ Accordingly, “to the extent the contract is not already void or voided, and to the extent we have the right to void the auction contract as to the NextWave licenses, we elect to void the contract.”⁴²

I. The FCC’s Partial Refund Order

On March 27, 2002, the FCC finally acted on the Auction 35 winning bidders’ refund petition, asserting that it had no obligation under the contract to refund *any* of the down

³⁸ As the Assistant Attorney General for the Office of Legal Counsel at the Department of Justice has stated, “even if the government were ultimately successful in its pursuit of this litigation, success would likely come after years of additional delay.” *Joint Hearing on the NextWave Settlement Agreement Before the Subcomm. on Commercial and Administrative Law and the Subcomm. on Courts, the Internet, and Intellectual Property of the House Comm. on the Judiciary*, 107th Cong. (2001) (statement of Jay S. Bybee).

³⁹ Letter from S. Mark Tuller, Vice President and General Counsel, Verizon Wireless, to John Rogovin, Deputy General Counsel, FCC, at 1 (Mar. 5, 2002) (“March 5 Letter”).

⁴⁰ *Id.* at 1-2.

⁴¹ *Id.* at 2.

⁴² *Id.*

payments, and rejecting the legal position asserted in Verizon Wireless's March 5 letter. The FCC conceded that, as a result of the D.C. Circuit's mandate, "the former NextWave licenses are not currently available for use by Auction No. 35 winning bidders."⁴³ Nevertheless, ignoring its own assurances in the Public Notices regarding prompt delivery and rescission in the event of "unavailability," the FCC concluded that the licenses' unavailability "is not a valid ground for relieving Verizon of its bid obligation," because "Verizon assumed a known risk of delay."⁴⁴

The FCC nonetheless agreed, in what it termed the exercise of its "discretion," to "partially waive" its rules and return 85 percent of the winning bidders' down payments. *Id.* at 6290-91 ¶¶ 12-13.⁴⁵ It said, however, that it would "maintain the pending status of the applications at issue," so that, if it prevails before the Supreme Court and then in subsequent proceedings, "winning bidders in Auction No. 35 will be required to pay the full amount of their winning bids or be subjected to default payments." *Id.* at 6291 ¶ 13. In other words, although the FCC concedes it cannot know whether or when it will be able to deliver the licenses, the agency continues to withhold the remainder of Verizon Wireless's down payment (nearly \$261 million) and to insist that Verizon Wireless remains obligated to pay the full remaining amount of its bids (more than \$8.4 billion) on ten days' notice of the FCC's intent to grant the licenses. *See id.*; 47 C.F.R. § 1.2109(a). Indeed, the FCC threatened to impose penalties—which, under the FCC's rules, as applied to the facts of this case, could exceed \$6 billion—if Verizon Wireless

⁴³ *See* Partial Refund Order at 6291-92 ¶ 16 & n.57.

⁴⁴ *Id.* at 6291-92 ¶ 16.

⁴⁵ Verizon Wireless has since applied for and, on April 29, 2002, received the partial (85 percent) refund of its down payment, totaling \$1,478,826,940. *See* Letter from S. Mark Tuller, Vice President and General Counsel, Verizon Wireless, to the Federal Communications Commission, Office of the Managing Director (Mar. 28, 2002).

refused to accept delivery of the licenses in the future. *See* Partial Refund Order at 6291 ¶ 13; 47 C.F.R. § 1.2104(g).⁴⁶

ARGUMENT

THE UNITED STATES HAS FAILED TO MAKE THE PROMPT DELIVERY REQUIRED UNDER THE AUCTION CONTRACT, ENTITLING VERIZON WIRELESS TO RESCISSION AND REFUND OF ITS ENTIRE DOWN PAYMENT.

A. Auction 35 Created a Contract Between the United States and Verizon Wireless, and the Parties' Obligations are Governed by Contract Principles.

An auction is a mechanism for an exchange of an offer and acceptance, thus inherently producing a contract. The close of the auction constitutes the acceptance of the bid, or offer, and creates “an executory contract of sale.” 7 Am. Jur. 2d *Auctions and Auctioneering* § 34 (1997); *see* U.C.C. § 2-328 (1999); *In re NextWave Personal Communications Inc.*, 200 F.3d 43, 60 (2d Cir. 1999) (per curiam). Spectrum auctions, like any auction, create a binding contractual obligation between the Commission and the winning bidder. *See* Memorandum Opinion and Order, *BDPCS, Inc.*, 15 FCC Rcd 17590, 17599-600 ¶ 16 (2000) (“The announcement of the winning bidder in an auction conducted by the Commission [is] like the acceptance of high bids in auctions in other settings”); Installment Payment Order, 14 FCC Rcd at 6581 ¶ 17 n.66 (auction creates a “contractual obligation” between “the Commission and the winning bidder as of the close of the auction”).⁴⁷ “When the United States enters into contract relations, its rights

⁴⁶ On April 8, 2002, Verizon Wireless filed a notice of appeal and petition for review of the FCC's Partial Refund Order in the D.C. Circuit. *See* Notice of Appeal and Petition for Review, *Cellco Partnership d/b/a Verizon Wireless v. FCC* (D.C. Cir. Apr. 8, 2002) (Nos. 02-1110 & 02-1111).

⁴⁷ Thus, at the close of the auction a commercial contract is formed between the United States and the winning bidder. That contract is properly the subject of this Court's Tucker Act jurisdiction. *See* 28 U.S.C. § 1491(a)(1). The FCC retains regulatory jurisdiction over a licensee's qualifications and proper use of the spectrum. The latter are not at issue in this case.

and duties therein are governed generally by the law applicable to contracts between private individuals.”⁴⁸

The FCC has consistently recognized that the close of a spectrum auction creates a “contract” governed by “standard auction and contract law principles.”⁴⁹ Thus, the FCC has taken the position that the auction rules “correspond to the terms of a standard auction contract,” including “the legal ground rules ‘implicit in a sale by auction.’”⁵⁰

Indeed, the FCC has succeeded in advocating that position in litigation. Before the Second Circuit, the FCC argued that “the acceptance of an auction bid creates a binding contract between the seller and the high bidder.”⁵¹ The court agreed that the “close of the auction established the FCC’s obligation to grant [a high bidder] the Licenses,” and that at the auction’s close “[t]he FCC was bound, and so was NextWave,” by the resulting contract. *In re NextWave*, 200 F.3d at 60, 62. After having convinced the Second Circuit to reject NextWave’s fraudulent conveyance claim on the ground that a contract forms at the close of an auction, the FCC is now judicially estopped from asserting that Auction 35 did not similarly form a contract.⁵² If the FCC

⁴⁸ *Franconia Assocs. v. United States*, 122 S. Ct. 1993, 2001 (2002) (internal quotation marks and citation omitted); see also *Everett Plywood & Door Corp. v. United States*, 419 F.2d 425, 430 (Ct. Cl. 1969) (recognizing the applicability of general commercial contract law to contracts in which United States is seller of goods).

⁴⁹ Brief for Respondent in Opposition at 21-22 n.13, 24, *NextWave Personal Communications Inc. v. FCC*, 531 U.S. 924 (2000) (No. 99-1980) (“FCC Br. in Opp.”); see *BDPCS*, 15 FCC Rcd 17590, 17599-600 ¶ 16 n.63 (“[F]ederal government auctions ‘are viewed under the same rules pertaining to the formation of contracts generally[.]’” (quoting *Commodities Recovery Corp. v. United States*, 34 Fed. Cl. 282, 289 (1995))).

⁵⁰ Brief for Appellant at 43 & n.*, *In re NextWave Personal Communications, Inc.*, 200 F.3d 43 (2d Cir. 1999) (per curiam) (No. 99-5063) (“FCC 2d Cir. *NextWave Br.*”) (emphasis added and citation omitted).

⁵¹ FCC 2d Cir. *NextWave Br.* at 25 n.*, 43 n.* (internal quotation marks omitted).

⁵² See *New Hampshire v. Maine*, 532 U.S. 742, 749 (2001) (“[W]here a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter,

were permitted to claim now that Auction 35 created no contractual relationship between the FCC and Verizon Wireless, it would enjoy the unfair advantage of seeking to enforce a contract when doing so is in the FCC's interest and denying the contract's existence whenever the FCC is asked to live up to its terms. Judicial estoppel prevents such self-serving changes in position.

B. The Auction Contract Required the FCC To Deliver the Licenses Promptly After the Close of the Auction.

The auction contract required the FCC to deliver the licenses for the winning bidders' *immediate use*, subject to the possibility that bidders would later be required to surrender the licenses if third parties prevailed in their legal challenges. This conclusion is compelled by: (i) basic background principles governing auction contracts, together with the FCC's custom and practice in administering auctions; (ii) the express terms of the auction contract, set forth in the Public Notices governing Auction 35; and (iii) the circumstances of Auction 35, including the acknowledged goals of both the FCC and the bidders.

1. Background Contract Principles

It is basic contract law that, where a time is not expressly specified, one who offers to sell property in his possession impliedly promises to deliver within a reasonable time—negating the FCC's view that wholly indefinite delay in delivery was contemplated in the Auction 35 contracts. *See* Restatement (Second) of Contracts § 204 cmt. d (1979) (“[I]f no time is specified, a term calling for performance within a reasonable time is supplied.”); 14 Richard A. Lord, *Williston on Contracts* § 43:7, at 587-88 (4th ed. 2000); U.C.C. § 2-309(1) (“The time for shipment or delivery or any other action under a contract if not provided in this Article or agreed simply because his interests have changed, assume a contrary position.” (internal quotation marks and citation omitted)); *see also* *Chancellor Manor v. United States*, 51 Fed. Cl. 137, 154 (2001); *Kraft, Inc. v. United States*, 30 Fed. Cl. 739, 763 (1994) (applying judicial estoppel to bar the United States from adopting inconsistent legal positions).

upon shall be a reasonable time.”).⁵³ In an auction contract, the seller impliedly agrees to deliver the goods promptly following the conclusion of the auction. *See Clay v. Harris*, 592 N.E.2d 1154, 1158 (Ill. App. Ct. 1992) (“[A] person who buys a car at an auction has a reasonable expectation to receive the car . . . within a reasonable time”; where auction contract does not specify a time for performance “a reasonable time to perform is implied”); *see generally* 7 Am. Jur. 2d *Auctions and Auctioneers* § 52 (1997); FCC 2d Cir. *NextWave* Br. at 43 & n.*.

This Court has confirmed that the implied requirement of reasonably prompt delivery applies to government contracts: “It is well settled that where a time is not fixed in a contract for performance of an obligation, performance within a reasonable time, dependent on the circumstances applicable, is required. Where no time limit is given, it is presumed that performance will be concluded within a reasonable time.”⁵⁴ Because the FCC cannot show that this established principle was displaced in the context of Auction 35, its view that bidders agreed to wait indefinitely for delivery is unsupportable.

Not only is prompt delivery implicit in every auction, but the requirement of prompt delivery was confirmed here by the FCC’s custom and practice in conducting spectrum auctions.⁵⁵ In all other FCC spectrum auctions for which public records are available (28 auctions in total), the average time from close of the auction to tender of the first licenses has

⁵³ The FCC has recognized that U.C.C. rules are relevant to the interpretation of its auction contracts. *See BDPCS*, 15 FCC Rcd at 17599 ¶ 16 n.63 (citing U.C.C. § 2-328(b) (1990)); *see also Everett Plywood & Door*, 419 F.2d at 430 (applying U.C.C. to contract in which United States was seller of goods).

⁵⁴ *Asco-Falcon II Shipping Co. v. United States*, 32 Fed. Cl. 595, 602 (1994) (citation omitted) (emphasis omitted).

⁵⁵ This Court has established that contract interpretation is to be guided by custom and practice in the industry. *See, e.g., Metric Constructors, Inc. v. NASA*, 169 F.3d 747, 752 (Fed. Cir. 1999) (“[E]vidence of trade practice and custom plays an important role in contract interpretation.”); *PCL Constr. Servs., Inc. v. United States*, 47 Fed. Cl. 745, 786-87 (2000).

been only 3.1 months, and in no case were the first licenses tendered more than 6 months after the auction closed.⁵⁶ As the FCC has stressed, “auctions rapidly award licenses to those who value [them] the most,” and “auctions have generally reduced the time to award licenses.”⁵⁷ Bidders are entitled to expect that the FCC will act consistently with its past practice and deliver licenses promptly.

2. The Express Terms of the Auction Contract

This is not a case where the auction contract is silent on the FCC’s delivery obligations. The Public Notices issued by the FCC prior to Auction 35 *expressly* assured bidders that spectrum licenses—including licenses subject to pending legal proceedings—would be delivered promptly at the close of the auction, and that bidders were not agreeing to wait for delivery until competing claimants’ claims were resolved. Most of the discussion in the Auction 35 Public Notices addressing the risks posed by pending proceedings is drawn directly from FCC Public Notices in Auction 22. Indeed, the FCC specifically referred Auction 35 bidders to the Auction 22 notices for an explanation of what it meant by offering licenses “*subject to pending proceedings*.” See Sept. 6, 2000 Notice, 15 FCC Rcd at 17256 n.18; *id.* n.16 (citing intervening

⁵⁶ See Table: Time to First Tender Notice for all Radio Spectrum Auctions, App. 479. Similarly, in the five other broadband PCS spectrum auctions that the FCC has held since 1995, the average time from the close of the auction to the first tender of licenses was 3.3 months. See Table: Time to First Tender Notice for All Broadband PCS Auctions, App. 477. Even when license applications are challenged, the FCC has issued licenses quickly after the auction’s close. For example, when NextWave originally contracted for these licenses, the licenses were vigorously challenged but were tendered within 8 months of the close of the auction. See NextWave Reconsideration Order, 15 FCC Rcd at 17501 ¶ 3. Similarly, the licenses NextWave won in a reauction of certain C and F Block licenses, which were also contested, were tendered within 6 months. See Public Notice, *Wireless Telecommunications Bureau Announces Conditional Grant of Broadband Personal Communications Services Entrepreneurs’ C Block Licenses to NextWave Personal Communications, Inc.*, 12 FCC Rcd 601 (1997).

⁵⁷ Report, *FCC Report to Congress on Spectrum Auctions*, WT Docket No. 97-150, FCC 97-353, 1997 FCC LEXIS 7490, at *51-*53 (rel. Oct. 9, 1997).

Public Notice that also relies on this passage). In the Auction 22 proceedings, bidders had raised precisely the point at issue here: “whether a license involved in a pending proceeding will be granted at the close of the auction or, instead, only after final adjudication of the pending proceeding and any appeals.” The FCC responded:

[S]uch a license ***will be granted at the close of the auction*** in order to serve the public interest in prompt implementation of PCS service . . . [T]he grant of such a license will be conditioned on the outcome of pending proceedings. . . . [A] license grant that is conditioned on the outcome of a pending proceeding may be undone if the basis for the grant is reversed as a result of the outcome of the proceeding.⁵⁸

Thus, when specifically queried regarding delivery risks, the FCC provided absolute assurance that the licenses “will be granted at the close of the auction” to advance the public interest in prompt use of available spectrum. The only condition associated with delivery was a condition *subsequent* to the grant, namely, that the outcome of litigation could result in the grant being “undone.” Obviously, a warning that a grant could be “undone” presupposes that the grant would be made prior to defeasance. By directing Auction 35 bidders to these statements made in connection with Auction 22, the FCC *expressly* promised to deliver spectrum at the auction’s close, conditioned only on the risk of subsequent surrender.

Beyond the FCC’s express reference to its representations in Auction 22, the description of risks in the Auction 35 Public Notices further confirms that prompt post-auction delivery of the licenses was contemplated. The Public Notices promised that the FCC would “return the payments made by winning bidders of licenses in Auction No. 35 in the event that such bidders are subsequently required to *surrender* licenses won to prior . . . license holders as a result of final determinations reached in pending proceedings.” *Id.* at 17256 (emphasis added). This

⁵⁸ Auction 22 Notice, 13 FCC Rcd at 24544 (emphasis added); *see also* Order, *Black Crow Wireless, L.P.*, 16 FCC Rcd 15643, 15645–46 ¶ 6 (2001) (“As a general matter, the Commission does not defer grant of license applications until pending proceedings are complete.”).

provision clearly anticipated that the FCC would issue the licenses promptly after the close of the auction even if the licenses were the subject of pending proceedings, giving the winning bidders possession and use of the licenses subject to possible later “surrender” if prior holders established a superior right. “Surrender,” of course, would not be possible if the licenses had not already been delivered to the winning bidder. The “surrender” provision assured bidders that, if they were required to surrender the licenses, their down payments would be returned and, by necessary implication, their obligations under the auction contract would be terminated.⁵⁹

The Notices explained that “[r]eturning payments to winning bidders if licenses won are later determined to be unavailable due to subsequent resolution of other proceedings furthers . . . vital public interest goals by reducing uncertainty in the licensing process and encouraging auction participants to bid on licenses regardless of whether they are subject to pending proceedings.” Sept. 6, 2000 Notice, 15 FCC Rcd at 17256-57. The assurance that the contract would be rescinded if a “subsequent court action” makes the licenses “unavailable” presumes and implements the requirement of prompt delivery. And the express commitment to “reducing uncertainty in the licensing process” contradicts the FCC’s current position that winning bidders

⁵⁹ Clearly, the Public Notices did not contemplate holding bidders to their obligations once the licenses had been surrendered to a third party and the bidders’ payments had been returned. Indeed, in its Partial Refund Order, the FCC acknowledged the logical connection between retention or refund of bidders’ down payments and maintenance or rescission, respectively, of the auction contract. *See* Partial Refund Order at 6291 ¶ 13 (stating that the FCC would withhold a portion of the down payment in order to “preserve the integrity of the auction [by] retain[ing] sufficient money to cover any future default payments”). Just as withholding a portion of the down payment was designed to preserve bidders’ obligations under the auction contract, the return of bidders’ down payments reflects the absence of any such obligations.

would be obliged to wait indefinitely for licenses they may or may not receive. Rather, the Public Notices promised to prevent such “uncertainty” by prompt delivery of the licenses.⁶⁰

The Public Notices’ promise of prompt delivery of the licenses reflects an emphasis on expedition that pervades the statute and rules establishing the auction program. The Act requires the FCC to design its auction rules to achieve the “development and rapid deployment of new technologies, products, and services . . . without administrative or judicial delays.” 47 U.S.C. § 309(j)(3)(A). Accordingly, the FCC’s regulations establish speedy auction procedures, precisely to “award licenses *quickly* to those parties who value them most highly and who are therefore most likely to introduce service rapidly to the public.”⁶¹ A winning bidder must submit, within 10 days after the close of the auction, a down payment of 20 percent of its winning bid. *See* 47 C.F.R. § 1.2107(b). Petitions to deny a winning bidder’s license application must be filed within 10 days. *See id.* § 1.2108(b)-(c). Once the FCC determines that a winning bidder is qualified to become a licensee and announces that it will grant the licenses, the bidder has only 10 days to pay the balance of its bid. *See id.* § 1.2109(a). Such expedition would make no sense without a requirement that licenses be delivered promptly when the auction closes. In sum, the Public Notices expressly promised delivery of the licenses “at the close of the auction,” subject to possible later “surrender” as a result of developments in the pending

⁶⁰ Other provisions of the Public Notices also demonstrate that the contract provided for, and presumed, prompt delivery, even in the event that litigation over title to the licenses was pending at the close of the auction. For example, the Notices required winning bidders to meet their obligations as licensees while the litigation was pending: “winning bidders of licenses subject to pending proceedings are still required to meet the normal payment and construction schedules established by the Commission.” Sept. 6, 2000 Notice, 15 FCC Rcd at 17257; Oct. 5, 2000 Notice, 15 FCC Rcd at 19494; Nov. 17, 2000 Notice, 15 FCC Rcd at 22469. Because the “payment and construction schedules” apply only to winning bidders that have received their licenses, *see* 47 C.F.R. §§ 1.2109(a), 24.203, this statement reinforces the promise that licenses won would be delivered promptly, subject to possible later surrender.

⁶¹ Fifth Competitive Bidding Order, 9 FCC Rcd at 5535 ¶5 (emphasis added).

litigation. The auction contract did not impose on winning bidders a risk that they would be kept on the hook indefinitely, and their down payments withheld without interest, even if unavailability of the licenses prevented the FCC from delivering them at the close of the auction.

3. Purposes and Circumstances of the Auction Contract

Finally, several crucial facts concerning the nature and purposes of Auction 35 leave no doubt that prompt delivery of the licenses was contemplated, and that bidders did not agree to be paralyzed in a 3-5 year financial purgatory while the FCC sought recovery of the licenses.⁶²

First, the FCC's primary purpose for conducting the auction in the face of NextWave's claims was to place the spectrum in the hands of those who could best *use* it right away, without waiting until the dispute over ultimate ownership was finally resolved. As the FCC explained, it "include[d] contested licenses in the auction to fulfill the Commission's statutory mandate to hasten the development and deployment of new technologies and services and to promote competition for the benefit of the public." Sept. 6, 2000 Notice, 15 FCC Rcd at 17256. The position the FCC is now taking—that the bidders are bound to await delivery of the spectrum until the final resolution of NextWave's claims—nullifies the whole idea of proceeding with the auction. After all, what was the FCC offering in this auction? The right to immediate use of the spectrum, *instead* of waiting until the end of the litigation. To say that the bidders agreed to defer any use until the end of the litigation is the antithesis of the very enterprise.

Second, the nature of this property—an essential input to the buyers' ongoing businesses—compels the conclusion that prompt delivery was contemplated. The FCC knew that the bidders had a pressing and immediate need for additional spectrum. As the FCC

⁶² See, e.g., *Holbrook v. Pitt*, 643 F.2d 1261, 1274 n.25 (7th Cir. 1981) ("It is appropriate for courts to supply contract terms requiring performance within a reasonable time where such terms are necessary to fulfill the purposes of the contract."); see also U.C.C. § 1-204.

explained in opposing a stay of Auction 35, “potential bidders may be severely disadvantaged if they are required to wait for the final resolution of NextWave’s litigation efforts before even commencing the bidding process. In the fast-evolving wireless market, *an indeterminate delay to await the final outcome of litigation might be a significant, or even crucial blow to future licensees’ ability to compete.*”⁶³ Indeed, the FCC’s auction rules—by requiring licensees to build out their facilities and offer services to the public on a specific, short timetable or lose their licenses—mandated that spectrum be purchased as an immediate input to a business and forbade bidding on spectrum as a speculative future investment. *See* 47 C.F.R. §§ 24.203, 24.843(a). Thus, Auction 35 bidders were by definition seeking to put spectrum licenses to immediate use.

Where, as here, a buyer is acquiring an input to meet current business needs, quick delivery is presumptively required absent a clear contrary statement. *See, e.g., PT Kaltim Prima Coal v. AES Barbers Point, Inc.*, 180 F. Supp. 2d 475, 484 (S.D.N.Y. 2001) (buyer’s need to use coal immediately to generate electrical power for its customers meant that time was of the essence; even where seller’s failure to deliver promptly was excused, buyer could not be required to wait for delivery).⁶⁴ The reason is obvious: where the goods sold are an input to an ongoing business, their value to the buyer depends heavily on prompt receipt. Indeed, the FCC has stated that the “value of a license” depends on “a bidder’s ability to introduce valuable new services and to deploy them quickly.” Fifth Competitive Bidding Order, 9 FCC Rcd at 5541-42 ¶ 24.

Third, where it is predictable at the time of contracting that any protracted delay in delivery would impose substantial hardship on the buyer, the law presumes that the parties

⁶³ FCC Stay Opposition at 19 (emphasis added).

⁶⁴ *See also Farmers Coop. Ass’n v. Garrison*, 454 S.W.2d 644, 649 (Ark. 1970) (where daily feed supplies are essential to buyer’s poultry business, “prompt delivery of the required quantity is necessarily an implied term in [the seller’s] contractual obligation”).

intended prompt delivery. “Time is . . . of the essence when . . . from the nature of the subject matter of the contract, the treating of time as a non-essential [term] would produce a hardship, and delay by one party in completing or in complying with a term would necessarily subject the other party to a serious injury or loss” *Edward Waters College, Inc. v. Johnson*, 707 So.2d 801, 802 (Fla. Dist. Ct. App. 1998). Here, it was obvious that any significant delay in delivery would cause great hardship to bidders. First, delay freezes as a financial resource the entire amount of a winner’s bid throughout the pendency of the dispute. Second, delay forces bidders to make costly substitute arrangements, such as deploying technology to increase the carrying capacity of existing spectrum, even while they face the looming prospect that the FCC could demand payment for the Auction 35 licenses, leaving the interim investment stranded. A buyer’s inability to make reasonable substitute arrangements without incurring a loss is an important indication that prompt delivery was contemplated.⁶⁵

The FCC fully understood that delay would cause such hardship. In opposing a stay of Auction 35, the FCC argued that deferring the auction would “severely disadvantage[]” bidders and prove a “significant, or even crucial blow” to their businesses. FCC Stay Opposition at 19. In addition, the FCC expressly recognized the need to “reduc[e] uncertainty” for bidders, Sept. 6, 2000 Notice, 15 FCC Rcd at 17256, and designed its auction procedures to achieve that end—not to subject bidders to the disabling uncertainty arising from an indefinitely persisting obligation to pay for licenses that the bidder may or may not eventually receive. Indeed, the FCC’s current

⁶⁵ See Restatement (Second) of Contracts § 242(b) & cmt. c (1979) (“Under any contract, the extent to which it reasonably appears to the injured party that delay may prevent or hinder him from making reasonable substitute arrangements is a consideration in determining the effect of delay.”); *PT Kaltim Prima Coal*, 180 F. Supp. 2d at 484 (when seller was unable to meet its delivery obligations pursuant to a contract for shipment of coal, buyer’s need to make immediate substitute purchases of coal meant that buyer did not have to await delayed delivery).

reading of the Auction 35 contract cannot be reconciled with its own “discretionary” decision in the Partial Refund Order to return a portion of the bidders’ down payments—which acknowledges that delay in delivery can result in substantial hardship to the bidders. *See* Partial Refund Order at 6291-92 ¶¶ 12-13. But if such hardship was inherent in the agreed terms of the auction, as the FCC now claims, *see id.* at ¶ 11, there was no reason to relieve the winning bidders of the harsh consequences of their bargain. An interpretation of the auction contract that depends upon a regulatory *deus ex machina* to ameliorate grave damage to the entire wireless industry cannot be indulged if any alternative construction of the contract is possible.⁶⁶

Finally, as the FCC has recognized, the fast pace of change in the wireless industry rendered the value of spectrum highly volatile.⁶⁷ It is basic contract law that, where the market is volatile, the seller has a duty of prompt delivery absent an express contrary provision. *See, e.g., Commonwealth Petroleum Co. v. Billings*, 759 P.2d 736, 738 (Colo. Ct. App. 1987) (“If the subject matter of an agreement is of uncertain, speculative, or fluctuating value, time may be considered to be of the essence.” (citing Restatement (Second) of Contracts § 241 cmt. e) (1979)); *Siderius, Inc. v. Wallace Co.*, 583 S.W.2d 852, 864 (Tex. App. 1979).

For all these reasons, it would have been economic “madness” for a bidder to obligate itself to pay such large sums for spectrum without a binding understanding that the licenses would be delivered within a reasonable time. *See United States v. Winstar Corp.*, 518 U.S. 839, 910 (1996) (it would have been “madness . . . to have engaged in these transactions with no more

⁶⁶ *See* Restatement (Second) of Contracts § 207 (1979) (contract must be construed in favor of the “meaning that serves the public interest”).

⁶⁷ Indeed, the spectrum that NextWave won in the C and F Block auctions was valued at \$4.7 billion by NextWave at the close of those auctions, at approximately \$1 billion by the bankruptcy court only six months later, and at nearly \$16 billion in January 2001 by the participants in Auction 35. *See NextWave*, 254 F.3d at 136; FCC Stay Motion at 3.

protection than the Government's reading would have given them"). Basic principles of contract law, as well as common sense, forbid adopting the FCC's interpretation of the contract.

C. Nowhere in the Contract Did Verizon Wireless Agree To Wait Indefinitely for Delivery of the Licenses.

The FCC will undoubtedly argue, as it did in its response to Verizon Wireless's refund request, that Verizon Wireless "assumed a known risk of delay" in entering the auction contract. Partial Refund Order at 6291-92 ¶ 16. There is no basis in law or fact for that argument.

1. The Public Notices Did Not Qualify the Duty of Prompt Delivery.

The FCC is likely to contend, as it did in the Partial Refund Order, that the "surrender clause" in the Public Notices commits Verizon Wireless to wait for delivery of the licenses until "final determinations" are reached in pending proceedings.⁶⁸ To the contrary, that clause, besides expressly referring to the FCC's representations in Auction 22, itself confirms that prompt post-auction delivery of the licenses was contemplated. The clause declares that "the Commission will return the payments made by winning bidders of licenses in Auction No. 35 in the event that such bidders are subsequently required to *surrender* licenses won to prior applicants or license holders as a result of final determinations reached in pending proceedings."⁶⁹ That language defines the risk that the pending proceedings pose to Auction 35 bidders as a risk of "surrender" of the licenses if third-party claimants prevailed. It thus plainly refers only to the *post-delivery* risk that winners might have to give up possession of the licenses because of an administrative or judicial ruling. By its very terms, the clause presupposes *prior* delivery of the licenses: warning bidders that they might have to "surrender" licenses makes

⁶⁸ See Partial Refund Order at ¶ 11.

⁶⁹ Sept. 6, 2000 Notice, 15 FCC Rcd at 17256 (emphasis added and citation omitted); Oct. 5, 2000 Notice, 15 FCC Rcd at 19493 (same).

sense only if they have already received them. Just as in Auction 22, the FCC squarely presented the litigation risk as a condition subsequent and confirmed that prompt delivery was promised.

Having expressly dealt with the risk of post-delivery defeasance, the Public Notices are bereft of the slightest hint that bidders must accept the altogether different (and potentially devastating) risk that the FCC seeks to impose here—that the FCC might delay delivery of the licenses for years while it attempts to reacquire possession and clear the title; that winning bidders would have no use of the spectrum in the interim; that during the entire period, no matter how long it might last, winning bidders must sacrifice interest on 20 percent of their total bid price and remain ready to pay the full amount of their bids (totaling billions of dollars) on short notice. Had the FCC notified bidders of *that* risk, there is little doubt that the auction would have produced either dramatically lower bids or, more likely, no bids at all.

Even the “surrender clause,” the only express disclaimer addressing title, did not contemplate that the Auction 35 winners would be *both* without use *and* without the right to rescission and return of their deposits. The surrender clause provides for a return to the status quo ante where surrender occurs “as a result of final determinations.”⁷⁰ The phrase “as a result of final determinations” modifies “surrender”; it reflects an assumption that possession would not be disturbed prior to a final determination. Nothing in the clause even hints at any disjunction between loss of possession and the right of rescission.⁷¹

⁷⁰ Sept. 6, 2000 Notice, 15 FCC Rcd at 17256; Oct. 5, 2000 Notice, 15 FCC Rcd at 19493.

⁷¹ In fact, this is precisely the reading of the surrender clause that Verizon Wireless put forward in its response to NextWave’s petition to postpone delivery. *See* Verizon Wireless’ Supplemental Comments at 3 (noting that a post-delivery victory by NextWave would require the FCC to “cancel the just-issued licenses and refund all payments (as it expressly committed to do)”). Nor did the FCC protest in response that Verizon Wireless had misread the auction contract. *See, e.g., Kenner Indus., Inc. v. Sewell Plastics, Inc.*, 451 So. 2d 557, 560 (La. 1984)

Because the FCC cannot point to any language referencing such extraordinary risks, it retreats to its final redoubt—general statements in the due diligence sections of the Notices that there was pending litigation, “[r]esolution” of which “could have an effect on the availability of spectrum,” and that bidders were “solely responsible for identifying associated risks.”⁷² From these provisions the FCC argues that, because the pendency of litigation was a “known risk,” bidders must have agreed to a delay of delivery until final resolution of the litigation.⁷³

That is a *non sequitur*. A statement that pending litigation may affect a transaction does not answer *how* it would affect the transaction. The due diligence clause is about the *investigation* of risk, not the *allocation* of risk. Here, the general due diligence clause must be read in light of the specific allocation of litigation risks disclosed to the bidders in the immediately following section of the Public Notice.⁷⁴ That section is entitled “*Clarification of Payment Issue Relating to Licenses Subject to Pending Proceedings*,” and it contains both the “surrender clause” and the repeated references to the Public Notices in Auction 22.⁷⁵ The latter section refers back to the “judicial proceedings” that were “noted above” (i.e., in the due diligence clause) and then “clarifies” the rights of the parties with respect to that litigation. The

(one party’s “silence” in face of other party’s post-contractual interpretation “indicated assent to [the other party’s] interpretation of the contract”).

⁷² Sept. 6, 2000 Notice, 15 FCC Rcd at 17256; Oct. 5, 2000 Notice, 15 FCC Rcd at 19493.

⁷³ Partial Refund Order at ¶ 16.

⁷⁴ See *Baton Rouge Oil & Chem. Workers Union v. ExxonMobil Corp.*, 289 F.3d 373, 377 (5th Cir. 2002) (“It is a fundamental axiom of contract interpretation that specific provisions control general provisions.” (citing Restatement (Second) of Contracts § 203(c) (1979)); accord *Gandal v. Telemundo Group, Inc.*, 23 F.3d 539, 546 (D.C. Cir. 1994); see also *Hollerbach v. United States*, 233 U.S. 165, 170-72 (1914) (general disclaimer requiring a bidder to investigate conditions at worksite cannot trump the government’s specific representations regarding such conditions); accord *United States v. Utah, Nevada & California Stage Co.*, 199 U.S. 414, 4165, 422-23 (1905).

⁷⁵ Sept. 6, 2000 Notice, 15 FCC Rcd at 17256; Oct. 5, 2000 Notice, 15 FCC Rcd at 19493.

only logical reading of the due diligence clause is that it charged bidders with a careful assessment of the NextWave litigation in the context of assessing the risk of *subsequent surrender* of the licenses.⁷⁶

The argument that the surrender clause and/or the due diligence clause relieved the FCC of its duty of timely delivery conflates two distinct contractual terms: warranty of title and time of delivery. Normally, a seller offering to convey property is presumed to promise both good title and delivery of possession in a reasonable time. When the seller notifies a buyer that a third party has a claim against the property, it qualifies the promise to convey good title, but does not, without more, qualify the distinct promise to deliver within a reasonable time the property it possessed at the time of the offer.⁷⁷ Thus, without an express commitment to do so, a buyer cannot be forced to wait indefinitely for possession while the seller attempts to quiet title to the property. *See, e.g., Kempff v. Morgan*, 291 So. 2d 520, 523 (La. Ct. App. 1974) (holding that a buyer of real property “could not be compelled to wait an unreasonable length of time, while the sellers attempted to correct . . . problems” with title), *overruled on other grounds by Lanusse v. Gerrets*, 357 So. 2d 45 (La. Ct. App. 1978). The Public Notices merely alerted bidders that the

⁷⁶ The FCC may contend that the due diligence clause’s warning that pending proceedings “could have an effect on the availability of spectrum” warned bidders of the potential unavailability of the licenses for prompt *delivery*—as opposed to the possible ultimate unavailability of good *title* after delivery. This argument cannot help the FCC. The same term is used in the next section, which promised that the “Commission will return payments made by winning bidders if licenses bid for are later determined to be unavailable due to a subsequent court action.” Sept. 6, 2000 Notice, 15 FCC Rcd at 17256 n.16. If “unavailability” refers to availability for *delivery*, the FCC expressly promised rescission for failure of delivery. The risk described in the first section cannot be broader than the rescission right described in the second, since they use the same term.

⁷⁷ *See, e.g., Seibel v. Purchase*, 134 F. 484, 489 (C.C.D.N.J. 1904) (a provision in a contract for sale of an option to purchase real property owned by a third party, which provided for return of the buyer’s down payment if the third party refused to convey clear title, did not alter the seller’s duty to deliver the deed on the date specified in the contract; when the seller failed to do so, the buyer was entitled to rescission and refund even though “the contract is silent upon the subject”).

FCC might not be able to convey good *title* to the licenses and that bidders might have to surrender them later; they in no way alerted bidders to the quite different risk that the FCC might not deliver *possession* of the licenses promptly. On the contrary, they expressly affirmed that the FCC was obligated to deliver the licenses promptly. In the absence of any provision in which Verizon Wireless affirmatively agreed to wait indefinitely for delivery of the licenses, the risk that the licenses might be unavailable for prompt delivery remained on the FCC.

2. Even if the Public Notices Qualified the FCC's Duty of Prompt Delivery, They Did Not Constitute an Undertaking by Bidders To Remain Bound Indefinitely if Licenses Could Not Be Delivered Promptly.

Even if the caveats in the Notices could be read to refer to a risk of nondelivery, it does not follow that the bidders agreed to remain bound to purchase the licenses for however long it took the FCC to prevail. On the contrary, a term that relates to the *time* at which performance is expected is distinct from a term that relates to the *ability* to perform at that time. A party's disclosure that it may have difficulty performing does not change the time at which performance is expected, but at best establishes a condition precedent to *its* duty to perform at that time. If the party is unable to perform at the time expected, it is not in breach because its failure to perform is excused, but the contract is nonetheless voidable at the election of the other party. "The words 'subject to' in a contract usually indicate a condition to one party's duty of performance *and not a promise by the other.*" 13 Richard A. Lord, *Williston on Contracts* § 38:16 at 443-44 (4th ed. 2000) (emphasis added). The failure of a condition precedent to performance cannot extend the promisee's obligation to purchase beyond the expected time; although the promisor may be immune from normal contract damages, the promisee is nonetheless entitled to release from the contract and restitution of any benefit it has conferred on the promisor. *See, e.g., Flores v. Raz*, 640 N.W.2d 159, 164 (Wis. Ct. App. 2001) (where condition precedent to sale of business was

not fulfilled within a reasonable time, the buyer was entitled to rescind the contract and receive a refund of its down payment).

The Uniform Commercial Code recognizes this principle, and, in fact, provides that a contract *may not* “require the buyer to stand ready to take delivery whenever the seller is excused from delivery by unforeseen circumstances.” Rather, if the seller proves unable to deliver goods within a reasonable time, the buyer *must* be given the option to “terminate and thereby discharge any unexecuted portion of the contract.” Contrary contractual provisions will not be enforced. *See* U.C.C. § 2-616 & cmt; *see also PT Kaltim Prima Coal*, 180 F. Supp. 2d at 483-84 (when seller’s delivery obligations were excused by force majeure, “[n]othing in the law or the contract required [the buyer] to wait for a performance that it reasonably believed would arrive too late for its . . . requirements”).

A case that exemplifies these principles is *Haskins Trading Co. v. S. Pfeifer & Co.*, 130 So. 469 (La. Ct. App. 1930). In *Haskins*, a contract for the sale of peas, which did not expressly specify a time for delivery, contained a stipulation by the seller that “[a]ll agreements are contingent upon strikes, delays of carriers and other causes unavoidable and beyond our control.” *Id.* at 469. Delivery of the peas was delayed by a government embargo, and the buyer refused the peas. The seller sued, arguing that the stipulation bound the buyer to accept delayed delivery; but the court held that the stipulation merely excused the seller’s duty to perform, and did not bind the buyer. “It would be most unfair to require that a purchaser, unless he expressly and unequivocally agreed thereto, should be indefinitely held under the obligation to accept a purchase of which he is in immediate need, but which, for all he knows, may be months in arriving.” *Id.* at 471. The Auction 35 contract is exactly analogous: at most, the allusions to pending litigation excused the FCC’s duty to deliver the licenses if they became unavailable;

under no reasonable construction did those provisions constitute an agreement by Verizon Wireless to remain bound indefinitely while the FCC attempted to reclaim the licenses.

D. Under the Doctrine of *Contra Proferentem*, any Ambiguity in the Auction Contract Must be Construed Against the FCC.

In our view, the auction contract unambiguously provided that the FCC would deliver the licenses promptly at the auction's close and that bidders would not be forced to remain bound indefinitely if delivery was delayed. But even if the contract were ambiguous on these points, that ambiguity is fatal to the FCC's position. The FCC unilaterally dictated and drafted the terms of the parties' contract, which it declared were "not negotiable."⁷⁸ Had the agency wished to impose another contractual duty on the bidders, it had the power to do so by setting forth that duty expressly. For that reason, under the doctrine of *contra proferentem*, any ambiguities in the contract are to be construed *against* the FCC. See Restatement (Second) of Contracts § 206 (1979) ("In choosing among the reasonable meanings of [an] agreement or a term thereof, that meaning is generally preferred which operates against the party who supplies the words . . .").⁷⁹

Contra proferentem applies with full force to contracts drafted by government agencies. "[A]s between two reasonable and practical constructions of an ambiguous contractual provision, . . . the provision should be construed less favorably to that party which selected the contractual language. This principle is appropriately accorded considerable emphasis [in cases involving government contracts] because of the Government's vast economic resources and stronger

⁷⁸ Oct. 5, 2000 Notice, 15 FCC Rcd at 19491.

⁷⁹ This Court has recognized that it is appropriate to rely on *contra proferentem* to render summary judgment for the non-drafting party in a dispute over an ambiguous contract. See, e.g., *Advanced Distribution Sys., Inc. v. United States*, 34 Fed. Cl. 598, 601, 604 (1995), *aff'd*, 277 F.3d 1346 (Fed. Cir. 2002).

bargaining position in contract negotiations.”⁸⁰ It specifically applies to notices setting forth the terms of government auctions. *See Rapp v. United States*, 2 Cl. Ct. 694, 698 (1983) (construing terms of auction sale notice against the government as auctioneer). “The terms of a contract are construed against the drafter. Where, as here, a public announcement is involved, its terms must be construed as they would have been understood by a member of the public.” *Id.*

Verizon Wireless submits that the auction contract cannot, as a matter of law, be read in a manner that allows the FCC to retain any of Verizon Wireless’s deposit or force any further performance by Verizon Wireless. If this Court disagrees and finds that there is an ambiguity in the contract that cannot be resolved in Verizon Wireless’s favor on the current record, “the case is not amenable to summary judgment,” and Verizon Wireless requests a hearing so that it can introduce evidence supporting its interpretation of the contract.⁸¹ Because the government drafted the contract, *contra proferentem* precludes granting judgment in the government’s favor if the Court finds that the contract is ambiguous.⁸² Thus, if this Court denies Verizon Wireless’s summary judgment motion, it must also deny any cross-motion by the government and allow the parties to take discovery and marshal evidence in aid of interpretation of the contract.

⁸⁰ *United States v. Seckinger*, 397 U.S. 203, 216 (1970); *see also P.R. Burke Corp. v. United States*, 47 Fed. Cl. 340, 351 (2000) (the rule of *contra proferentem* “is especially applicable to [a] Government contract[] where the contractor has nothing to say as to its provisions” (internal quotation marks and citation omitted)).

⁸¹ *Cray Research, Inc. v. United States*, 41 Fed. Cl. 427, 436 (1998) (“If a written contract is unclear, . . . prior or contemporaneous extrinsic evidence that does not contradict the written language of the contract may be introduced to establish its meaning.”).

⁸² *See Metric Constructors, Inc. v. United States*, 44 Fed. Cl. 513, 523 (1999) (holding that the “reasonableness” of the non-drafting party’s interpretation “place[d] the burden of the ambiguity upon the drafting party under the principle of *contra proferentem*,” and thus summary judgment in favor of the drafting party was inappropriate), *aff’d*, 2001 WL 303240 (Fed. Cir. Mar. 20, 2001) (No. 00-5055).

E. The FCC's Failure To Deliver the Licenses Promptly Entitles Verizon Wireless to Rescind the Auction Contract.

Over 18 months have passed since the conclusion of Auction 35, and the FCC has failed to deliver the contested licenses to the winning bidders. Moreover, there is no clear prospect of delivery until the conclusion of the *NextWave* litigation, which may continue for many years to come. The FCC's failure to deliver the licenses to the winning bidders in a timely manner entitles Verizon Wireless to rescind the auction contract, whether the Court finds the agency's nondelivery to be a breach of the contract or to be excused by the failure of a condition precedent to the FCC's performance (or by the impossibility of the FCC's performance).

1. The FCC's Failure to Deliver the Licenses Promptly Was a Material Breach, Giving Verizon Wireless the Right to Rescission and Damages.

As we have shown, the auction contract contains an unqualified promise by the FCC to deliver the licenses promptly after the close of the auction. The "surrender" clause in the Public Notices does not qualify that promise to deliver possession of the licenses promptly, but qualifies only the FCC's obligation to provide good title. The FCC's failure to make timely delivery thus is a breach of the auction contract. *See* Restatement (Second) of Contracts § 235 ("When performance of a duty under a contract is due any non-performance is a breach.").

Because the FCC's breach goes to the heart of the auction contract, it is a material breach. "In determining the materiality of a breach we review the totality of events and circumstances. This flexible approach examines the nature and effect of the breach in light of how the contract was viewed, bargained for, entered into, and performed." *Alaska Pulp Corp. v. United States*, 48 Fed. Cl. 655, 659 (2001) (citations omitted). The gulf between the auction contract's promises to Verizon Wireless (prompt receipt of licenses or, failing that, rescission) and what the FCC now holds out to it (an indefinitely persisting contingent obligation to pay, indefinite loss of use of

down payment, and no certainty that the licenses will ever be received) is material on any view. *See, e.g., G.C.I., Inc. v. Haught*, 7 P.3d 906, 909 (Wyo. 2000) (“An unreasonable delay in performance constitutes a breach and justifies the remedy of cancellation.”).

The FCC’s material breach gives Verizon Wireless the right to terminate the auction contract. “[M]aterial breach terminates the contract, relieving the injured party of its remaining duties of performance.” *Alaska Pulp*, 48 Fed. Cl. at 659; *see* 14 Richard A. Lord, *Williston on Contracts* § 43:7, at 587-88 (4th ed. 2000) (“[T]here is an implied condition in virtually every contract that performance must occur within a reasonable time, and a breach of this implied condition will excuse further performance by the other party.”).⁸³

Verizon Wireless’s right to rescind is confirmed by this Court’s case law. In *Rash v. United States*, 360 F.2d 940 (Ct. Cl. 1966), for example, the purchaser of a former Air Force base sued to rescind the contract when the government found after signing the contract that it did not own part of the land sold. The buyer agreed to give the government a brief time to try to perfect its title; however, when it appeared that those efforts could take an extended time and might be unsuccessful, the purchaser invoked the right to rescind. The government refused to do so. Holding that the government was “under an obligation to grant the plaintiff’s request for rescission,” the Court exercised its equitable powers to rescind the contract and refund the

⁸³ Courts have long ordered rescission when the seller does not have, and is unable to acquire, possession of or title to the goods sold within a reasonable time. *See, e.g., Gill Equipment Co. v. Kaufman*, 196 F.2d 800 (5th Cir. 1952) (ordering the return of buyer’s payment where the seller did not have clear title to the goods and third party had taken possession of the goods); *Sandri v. United States*, 266 F. Supp. 139, 142 (D. Mass. 1967) (ordering rescission of auction contract where the item sold was not “property” that could be transferred and thus the “government had nothing to transfer to the plaintiff” at auction); *Davis v. Gilliam*, 44 P. 119, 120 (Wash. 1896) (seller could not recover for breach of contract where seller was unable to deliver because the goods were in possession of third party).

money paid under it, and also awarded damages caused by the government's wrongful refusal to rescind. *Id.* at 947. The result here should be the same.⁸⁴

On March 5, 2002, Verizon Wireless exercised its right of rescission by notifying the FCC by letter that it “elect[s] to void the contract” for “the NextWave portion of Auction No. 35 (that is, the portion relating to spectrum for which NextWave is currently the licensee).” March 5 Letter at 1-2.⁸⁵ As a result, all of Verizon Wireless’s remaining contractual obligations were terminated. Accordingly, the FCC was required to refund all of Verizon Wireless’s down payment; it had no “discretion” in this regard. Partial Refund Order at 6290-91 ¶¶ 12, 13. Nor does the FCC have any right to force Verizon Wireless to take delivery of the licenses on pain of default penalties, as it claimed in the Partial Refund Order. *Id.* at 6290 ¶ 11. The FCC’s refusal to rescind and refund necessitates a ruling by this Court that the agency is required to do so.⁸⁶

⁸⁴ See also *Mobil Oil Exploration & Producing Southeast, Inc. v. United States*, 530 U.S. 604, 605 (2000) (holding that the United States had “substantially breached” its contract with the plaintiff oil companies by the passage of a law that effectively increased the time it would take for the companies to get permission to begin exploration, and that the Government was required to refund the plaintiffs’ money).

⁸⁵ Although Verizon Wireless’s letter referred only to the licenses that have been restored to NextWave, the FCC’s rejection of Verizon Wireless’s position and its recognition that UrbanCom is similarly situated to NextWave, see Partial Refund Order at 6283-84, 6286-87, 6291-92 ¶¶ 1, 4, 14, 17, demonstrate that it would have been futile for Verizon Wireless to inform the FCC of its intent to void the contract for the UrbanCom licenses. See, e.g., *Wolff & Munier, Inc. v. Whiting-Turner Contracting Co.*, 946 F.2d 1003, 1009 (2d Cir. 1991).

⁸⁶ Although this Court lacks general equitable powers, it may act in equity, including awarding rescission, when equitable authority is “employed incidentally to this court’s general monetary jurisdiction either as equitable procedures to arrive at a money judgment, . . . or as substantive principles on which to base the award of a money judgment.” *Pauley Petroleum Inc. v. United States*, 591 F.2d 1308, 1315 (Ct. Cl. 1979); see also *Rash*, 360 F.2d at 947.

2. In the Alternative, the Unavailability of the Licenses Constituted a Failure of a Condition Precedent to the FCC's Performance, Entitling Verizon Wireless to Rescission and Restitution.

Even if the Court concludes that the Public Notices' caveats about pending litigation excused the FCC's duty of prompt delivery in the event that a court ordered return of the licenses to a third party, the FCC's failure to make timely delivery nonetheless entitles Verizon Wireless to rescission of the contract and restitution of its down payment. On this reading of the contract, as we have shown, *see supra* Part C.2, the availability of the licenses is a condition precedent to the FCC's duty of prompt delivery, and the failure of that condition (or, put differently, the impossibility of delivery of the licenses) excuses the FCC's performance. As discussed above, however, the failure of a condition precedent to performance, while it excuses the promisor's duty to perform, cannot extend the *promisee's* obligation; on the contrary, the promisee is entitled to release from the contract and restitution of any benefit it has conferred on the promisor. *See, e.g., Flores*, 640 N.W.2d at 164; *Everts v. Parkinson*, 555 S.E.2d 667, 677 (N.C. Ct. App. 2001) (“[F]ailure of a seller to comply with conditions precedent . . . may allow the buyer to terminate the contract prior to closing . . .”).

The result is the same if the unavailability of the licenses is viewed as making it impossible for the FCC to perform. An event rendering one party's performance impossible justifies the other party in rescinding the contract and receiving restitution.⁸⁷ That the NextWave and UrbanCom licenses may one day become available does not alter this result: when impossibility of performance, even if “not permanent, persists for a length of time sufficient to go to the essence of the contract . . . the temporary non-performance on one side will justify the

⁸⁷ *See* James P. Nehf, *Corbin on Contracts* § 78.7 (2001) (“When a party has been discharged under the impossibility doctrine, courts will not permit that party to retain the benefits of a performance rendered by the other without making just compensation.”).

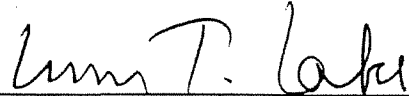
other party in rescinding the contract altogether.” 18 Walter H.E. Jaeger, *Williston on Contracts*, § 1957, at 151 (3d ed. 1978).⁸⁸ In this case, there can be no doubt that the impossibility of delivering the licenses has persisted so long as to vitiate the essence of the contract. As demonstrated above, *see supra* at Parts B and E.1, when Verizon Wireless exercised its right to rescind on March 5, 2002, it was already far too late for the FCC to make timely delivery. It is even more clearly too late now, 18 months after the auction. Verizon Wireless is entitled to rescission and refund now, together with damages caused by the government’s wrongful refusal to rescind, whether or not the FCC succeeds in reclaiming the licenses years from now.

CONCLUSION

For these reasons, the Court should grant summary judgment in favor of plaintiff Verizon Wireless on Counts One and Three of the Complaint, declare that the auction contract is terminated, order the refund of the remainder of Verizon Wireless’s down payment, and institute further proceedings to determine damages and interest. In the alternative, should this Court determine that Verizon Wireless is not entitled to summary judgment on the current record, Verizon Wireless requests a hearing to introduce evidence in support of its position.

⁸⁸ *See also Flores*, 640 N.W.2d at 163 (the implied condition of third-party approval prior to sale was “subject to a reasonable time limit”; once that time limit was exceeded, the fact that the seller was ultimately able to obtain approval did not justify holding the buyer to the contract).

Respectfully submitted,



WILLIAM T. LAKE*
WILMER, CUTLER & PICKERING
2445 M Street, N.W.
Washington, D.C. 20037
(202) 663-6000
(202) 663-6363 (fax)

JOHN THORNE
1515 North Courthouse Road, Suite 500
Arlington, VA 22201
(703) 351-3900

MARK L. EVANS
KELLOGG, HUBER, HANSEN, TODD &
EVANS, P.L.L.C.
1615 M Street, N.W., Suite 400
Washington, D.C. 20036
(202) 326-7900

ANDREW G. MCBRIDE
WILEY REIN & FIELDING LLP
1776 K Street, N.W.
Washington, D.C. 20006
(202) 719-7000

RICHARD G. TARANTO
FARR & TARANTO
1220 19th Street, N.W., Suite 800
Washington, D.C. 20036
(202) 775-0184

S. MARK TULLER
1300 I Street, N.W., Suite 400-W
Washington, D.C. 20005
(202) 589-3760

Counsel for Cellco Partnership d/b/a Verizon Wireless

September 9, 2002

**Counsel of Record*

Attachment G

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

RECEIVED
OVER THE COUNTER

SEP 9 2002

CELLCO PARTNERSHIP d/b/a
VERIZON WIRELESS,

Plaintiff,

v.

UNITED STATES OF AMERICA,

Defendant.

THE OFFICE OF THE CLERK
U.S. COURT OF FEDERAL CLAIMS

No. 02-280C
Judge Sarah L. Wilson

PLAINTIFF'S OPPOSITION TO MOTION TO STAY

JOHN THORNE
1515 North Courthouse Road, Suite 500
Arlington, VA 22201
(703) 351-3900

WILLIAM T. LAKE*
WILMER, CUTLER & PICKERING
2445 M Street, N.W.
Washington, D.C. 20037
(202) 663-6000
(202) 663-6363 (fax)

MARK L. EVANS
KELLOGG, HUBER, HANSEN, TODD &
EVANS, P.L.L.C.
1615 M Street, N.W., Suite 400
Washington, D.C. 20036
(202) 326-7900

ANDREW G. MCBRIDE
WILEY REIN & FIELDING LLP
1776 K Street, N.W.
Washington, D.C. 20006
(202) 719-7000

RICHARD G. TARANTO
FARR & TARANTO
1220 19th Street, N.W., Suite 800
Washington, D.C. 20036
(202) 775-0184

S. MARK TULLER
1300 I Street, N.W., Suite 400-W
Washington, D.C. 20005
(202) 589-3760

Counsel for Cellco Partnership d/b/a Verizon Wireless

** Counsel of Record*

September 9, 2002

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IN THE UNITED STATES COURT OF FEDERAL CLAIMS

CELLCO PARTNERSHIP d/b/a
VERIZON WIRELESS,

Plaintiff,

v.

UNITED STATES OF AMERICA,

Defendant.

No. 02-280C
Judge Sarah L. Wilson

ORAL ARGUMENT
REQUESTED

PLAINTIFF'S OPPOSITION TO MOTION TO STAY

Plaintiff Verizon Wireless respectfully opposes the government's extraordinary request that this Court depart from its "paramount obligation to exercise jurisdiction timely in cases properly before it."^{1/} The government's sole basis for that request is its assertion that two lawsuits pending in other courts may produce conflicting decisions or may moot this case.^{2/} That assertion is wrong as to both lawsuits.

Verizon Wireless respectfully requests an opportunity to present oral argument on the government's motion.

^{1/} *Commonwealth Edison Co. v. United States*, 46 Fed. Cl. 29, 33-34 (2000).

^{2/} Defendant's Motion to Stay Proceedings, at 3, 4, 20, *Cellco Partnership d/b/a Verizon Wireless v. United States* (Fed. Cl. Aug. 26, 2002) (No. 02-280C) ("Motion to Stay").

1. A future Supreme Court decision in *NextWave* is irrelevant to this case.

The first lawsuit to which the government refers is the *NextWave* appeal in the Supreme Court, which addresses whether Section 525 of the Bankruptcy Code prevented the FCC from canceling NextWave's licenses when NextWave failed to pay for them.^{3/} Contrary to the government's argument here, (a) a decision in that case cannot conflict with a resolution in this case, and (b) a NextWave victory in the Supreme Court cannot moot this case. Indeed, the government itself has strenuously argued in prior pleadings that its Supreme Court dispute with NextWave has "little in common" with its current dispute with Verizon Wireless.^{4/} The government twice acquiesced in Verizon Wireless's unsuccessful requests for expedited review of the contract claim in the D.C. Circuit case discussed in Part 2 below; that acquiescence belies its present assertion that resolution of the contract dispute should await the Supreme Court's *NextWave* ruling.^{5/}

The Supreme Court's decision in *NextWave* cannot conflict with this Court's resolution of the current case, because the issues are not just sharply different but independent. The Supreme Court will not decide whether the licenses should be given to Verizon Wireless -- it will

^{3/} *NextWave Personal Communications, Inc. v. FCC*, 112 S. Ct. 1202 (2002) ("*NextWave*").

^{4/} Response of the Federal Communications Commission to Petitioner's Motion for Panel Assignment at 1, *Cellco Partnership v. FCC* (D.C. Cir. Apr. 15, 2002) (Nos. 02-1110, 02-1111); see Opposition of the Federal Communications Commission to Verizon's Petition to Enforce the Mandate at 1, *NextWave Personal Communications Inc. v. FCC* (D.C. Cir. Feb. 15, 2002) (No. 01-1402).

^{5/} See Unopposed Motion to Expedite, *Cellco Partnership v. FCC* (D.C. Cir. Apr. 17, 2002) (Nos. 02-1110, 02-1111); Response of the Federal Communications Commission to Verizon's Motion to Amend the Briefing Schedule, *Cellco Partnership v. FCC* (D.C. Cir. June 25, 2002) (Nos. 02-1110, 02-1111); see also Motion of the Federal Communications Commission to Amend the Briefing Schedule, *Cellco Partnership v. FCC* (D.C. Cir. June 24, 2002) (Nos. 02-1110, 02-1111).

only decide whether Section 525 of the Bankruptcy Code prevented the FCC from canceling NextWave's licenses.^{6/} Verizon Wireless's complaint in this case alleges that, wholly apart from any answer to that bankruptcy law question, the FCC has *already* committed a breach of its contractual obligation to make timely delivery of the licenses. Verizon Wireless thus has a contractual right to rescind the Auction 35 contract and to receive a refund of its down payment plus appropriate damages -- regardless of whether the FCC can, in the future, recover the licenses from NextWave.^{7/} The present contractual question -- whether the auction contract entitled Verizon Wireless to receive the licenses promptly or (as the FCC says) obliged Verizon Wireless to wait indefinitely, for years, to receive them -- is no part of the Supreme Court case. The *NextWave* resolution thus cannot conflict with any resolution in this case.

In fact, the FCC cannot fairly represent that it will get the licenses back even if it prevails in the Supreme Court in *NextWave*. The Supreme Court cannot and will not decide whether the FCC can *now* recover the licenses from NextWave -- it will only decide whether the bankruptcy code operates to prohibit the government from taking back the licenses from NextWave on account of NextWave's failure to pay. The government does not disclose that the D.C. Circuit has preserved other challenges to the cancellation of NextWave's licenses and that those issues

^{6/} See Petition for a Writ of Certiorari, *FCC v. NextWave Personal Communications, Inc.* (U.S. Oct. 19, 2001) (No. 01-653) ("Petition for a Writ of Certiorari") ("Question presented: Whether Section 525 of the Bankruptcy Code, 11 U.S.C. 525, conflicts with and displaces the Federal Communications Commission's rules for congressionally authorized spectrum auctions, which provide that wireless telecommunications licenses obtained at auction automatically cancel upon the winning bidder's failure to make timely payments to fulfill its winning bid.").

^{7/} Plaintiff has filed today a motion for summary judgment, which describes more fully Verizon Wireless's contract claim and the underlying dispute. See Motion for Summary Judgment, *Cellco Partnership d/b/a Verizon Wireless v. United States* (Fed. Cl. Sept. 9, 2002) (No. 02-280C).

await resolution on remand in that court.^{8/} Possible further certiorari proceedings after that could push a final resolution of that case into 2004 or later.^{9/} In short, a final FCC victory in *NextWave* -- which could not conflict with any ruling on the contract issues here -- also is unlikely to come without “years of additional delay.”^{10/}

The government is also wrong in asserting that an FCC *loss* in *NextWave* would moot this case.^{11/} The government says that, if

NextWave prevails before the Supreme Court[,] then Auction No 35 likely would be, for all relevant purposes, void, and Verizon would receive a *timely* refund of all monies deposited for the licenses in question.^{12/}

It is certainly the case that, if NextWave wins in the Supreme Court, Auction 35 would be void and a refund to Verizon Wireless would be required. But a refund at that time cannot possibly be “timely,” under the contract as pleaded in the present complaint, and *that* question must still be decided in this Court, because Verizon Wireless seeks damages for what is *already* a breach, including lost interest on its down payment.^{13/} Simply, a future decision invalidating the FCC’s cancellation of NextWave’s licenses will not moot Verizon Wireless’s prayer for damages for

^{8/} See *NextWave Personal Communications, Inc. v. FCC*, 254 F.3d 130, 156 (D.C. Cir. 2001).

^{9/} As the Assistant Attorney General for the Office of Legal Counsel at the Department of Justice has admitted, “even if the government were ultimately successful in its pursuit of this litigation, success would likely come after years of additional delay.” *Joint Hearing on the NextWave Settlement Agreement Before the Subcomm. on Commercial and Administrative Law and the Subcomm. on Courts, the Internet, and Intellectual Property of the House Comm. on the Judiciary*, 107th Cong. (2001) (statement of Jay S. Bybee).

^{10/} *Id.*

^{11/} Motion to Stay at 3, 20.

^{12/} *Id.* at 20 (emphasis added).

^{13/} See Complaint, at ¶¶ 29-31, *Cellco Partnership d/b/a v. United States* (Fed. Cl. Apr. 5, 2000) (No. 02-280C) (“Complaint”); Plaintiff’s Motion for Summary Judgment at 36-38.

the FCC's past breach. This Court will still have to adjudicate contract liability in order to resolve Verizon Wireless's damage claim.

2. The D.C. Circuit proceedings in *Cellco* also provide no basis for a stay.

The other lawsuit to which the government refers is the D.C. Circuit proceeding in *Cellco*.^{14/} Verizon Wireless has sought review in that court of the FCC's Partial Refund Order,^{15/} in which the FCC refused to honor Verizon Wireless's notice of rescission of the contract and awarded only a partial refund to the Auction 35 winners. The D.C. Circuit proceeding is limited to review of that administrative action. Because the FCC based that administrative determination in part on its interpretation of the auction contract, the status of the contract at the time the Partial Refund Order was issued is one of the issues properly before the D.C. Circuit. But that fact neither divests this Court of its jurisdiction (addressed in Part 4 *infra*) nor supports a stay of this case in favor of the court of appeals. To the extent there is any overlap of issues between the cases, normal considerations of multicase coordination (even more, the stringent stay standards) require *this* case to proceed.

First: Because there are other, independent grounds for decision in the D.C. Circuit, the court of appeals may never reach even the basic question of contract breach that is presented to this Court. Verizon Wireless's complaint here alleges that the contract was breached when the FCC failed to make timely delivery. This contractual breach is not the only basis for challenging the later Partial Refund Order. While Verizon Wireless's obligations are a matter of contract, the FCC must also act in accordance with its statutory mandate and the Administrative Procedure

^{14/} *Cellco Partnership v. FCC* (D.C. Cir. Apr. 15, 2002) (Nos. 02-110, 02-1111).

^{15/} Order, *Requests for Refunds of Down Payments Made in Auction No. 35*, 17 FCC Rcd 6283 (2002) ("Partial Refund Order"), review pending *sub nom. Cellco Partnership v. FCC* (D.C. Cir. Apr. 15, 2002) (Nos. 02-110, 02-1111).

Act. Thus, the D.C. Circuit could reverse the Partial Refund Order on administrative law grounds (*e.g.*, arbitrary and capricious) without ever addressing the contractual issues before this Court.

Second: Only in this case is complete resolution of the dispute possible. The D.C. Circuit proceeding will not enable Verizon Wireless to obtain the judgment for damages it seeks from this Court.^{16/} The FCC does not have authority to award damages or interest on the deposit monies Verizon Wireless alleges that the agency held in breach of contract. Indeed, in its Partial Refund Order the FCC asserted that it lacks statutory authority to pay interest on auction deposits.^{17/} That relief is available only from this Court, and thus this Court will have to pass on the contract issues at some point regardless of the action or inaction of any other court. Additionally, only this Court, unlike the D.C. Circuit, could hold a factual proceeding if it becomes necessary to do so. This Court has recognized the inappropriateness of staying its proceedings in favor of those in another court where the latter would “not be able to adjudicate all issues relevant to our litigation.”^{18/}

Third: This contract action was filed first and has progressed further than the D.C. Circuit proceeding. Even if this Court were to consider this a situation “where more than one court has concurrent jurisdiction over the subject matter of a case,” comity dictates that litigation should

^{16/} Pursuant to 28 U.S.C. § 2342(1), the court of appeals may enjoin, set aside, suspend (in whole or in part), or determine the validity of a final FCC order made reviewable by section 402(a) of title 47; in the event the D.C. Circuit reverses the FCC’s refund order, the court would then remand to the FCC to carry out the judgment of the court. 47 U.S.C. § 402(b).

^{17/} *Partial Refund Order*, 17 FCC Rcd at 6287.

^{18/} *Nat’l Bank of Detroit v. United States*, 1 Cl. Ct. 712, 716 (1983).

continue in the case that was first filed and has progressed the furthest.^{19/} Verizon Wireless has filed today a motion for summary judgment, to which, under this Court's rules, the government's response will be due on October 7, 2002; plaintiff's reply will be due on October 21, 2002.^{20/} By contrast, in the court of appeals, which has declined to expedite its proceedings, the government will not file its brief until January 8, 2003; Verizon Wireless's reply will be due on February 6, 2003, and oral argument will not occur until April 15, 2003.^{21/} Thus, the liability issues before this Court can be fully briefed, argued, and resolved before *Cellco* will be considered by the D.C. Circuit. This Court's three-month headstart is significant in the context of a \$16 billion contract disagreement that is impairing the health of the wireless telecommunications industry.^{22/}

These compelling reasons for this case to proceed (especially given the severe harm that delay would cause, *see* Part 3, *infra*) are not legitimately countered by the government's mere preference for the D.C. Circuit as a forum -- any more than they would be by any party's tactical preference for another forum. The government's desire to stay this case so that the D.C. Circuit will act first is "plainly underlain"^{23/} by its hope that the court of appeals would be more likely to

^{19/} *Northrop Corp. v. United States*, 27 Fed. Cl. 795, 802 (1993); *see Commonwealth Edison*, 46 Fed. Cl. at 34; *New York Power Auth. v. United States*, 42 Fed. Cl. 795, 802 (1999).

^{20/} *See* RCFC 7.1(c). In the D.C. Circuit case, the government acquiesced in Verizon Wireless's request for a briefing schedule under which the government would have filed its brief by July 24, 2002. Unopposed Motion to Expedite, *Cellco Partnership v. FCC* (D.C. Cir. Apr. 17, 2002) (Nos. 02-1110, 02-1111).

^{21/} Order, *Cellco Partnership d/b/a Verizon Wireless v. United States* (D.C. Cir. Aug. 2, 2002) (No. 02-1110).

^{22/} *See* Part 3, *infra*. *See also Another Telecom Fiasco*, Wall St. J., Aug. 21, 2002, at A12 ("All of this is playing havoc with an industry already in chaos.").

^{23/} *Commonwealth Edison*, 46 Fed.Cl. at 34.

accord judicial deference to the FCC's view of the dispute.^{24/} That hope not only is an improper basis for shifting the forum, but also is misguided. As we show in our motion for summary judgment, a government agency is not entitled to deference on the interpretation of a contract to which it is a party -- especially a contract it drafted -- regardless of the court in which the agency is litigating.^{25/} The government must defend itself like any other party obligated by the terms of a contract, and, despite the government's contrary preference, this Court is a highly appropriate forum in which to do so.^{26/}

3. A stay would cause severe and continuing harm to Verizon Wireless and its customers.

The delay the government seeks here would cause severe and continuing harm to Verizon Wireless. As detailed in our motion for summary judgment, the government -- despite its own failure to perform under the auction contract -- continues to hold \$261 million of Verizon Wireless's down payment without interest. It also asserts that Verizon Wireless remains liable to pay the remaining \$8.4 billion of its winning bid on 10 days' notice, if and when the FCC reclaims the licenses from NextWave and tenders them. Each month of delay in adjudicating Verizon Wireless's claim costs the company half a million dollars of interest on the withheld down payment alone. Even a ten-month stay of this case (until, say, July 2003, when the D.C.

^{24/} Compare *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984) (deference toward certain administrative actions) with *National Fuel Gas Supply Corp. v. FERC*, 811 F.2d 1563, 1571 (D.C. Cir. 1987) (no deference when the agency is an interested party to the agreement).

^{25/} See Plaintiff's Motion for Summary Judgment at 35.

^{26/} This Court "historically has been the court of greatest expertise in Government contract claims." *Oroville-Tonasket Irrigation Dist. v. United States*, 33 Fed. Cl. 14, 20 (1995) (citing S. Rep. No. 95-1118, 95th Cong., 2d Sess. 10, reprinted in 1978 U.S.C.C.A.N., 5235, 5244); see, e.g., *Yankee Atomic Elec. Co. v. United States*, 112 F.3d 1569, 1575 (Fed. Cir. 1997); *Winstar Corp. v. United States*, 64 F.3d 1531, 1546 (Fed. Cir. 1995), *aff'd*, 518 U.S. 839 (1996).

Circuit might rule at the earliest) would cost Verizon Wireless \$5 million in lost interest. More important, the massive total \$8.7 billion contingent debt adversely affects the credit rating of both Verizon Wireless and its parent, Verizon Communications Inc.^{27/} Standard & Poor's has downgraded Verizon Communications's credit outlook from "stable" to "negative" expressly because of "the uncertainty regarding Verizon's ultimate obligation to pay the total \$8.7 billion it bid in the auction."^{28/} Moody's Investors Service similarly has placed the long-term debt ratings of Verizon and Verizon Wireless on review for possible downgrade because of this huge contingent debt.^{29/} These downgrades, directly caused by the FCC's continuing assertion that Verizon Wireless remains indebted to it for \$8.7 billion, have increased the cost Verizon Wireless and its parent Verizon incur to obtain capital and have impaired their ability to raise capital in the equity markets and to undertake other investments necessary to their businesses -- both wireless and wireline.^{30/}

The FCC's stance also prevents Verizon Wireless from using the disputed funds for other useful business opportunities -- such as investing in new spectrum to better serve its customers.^{31/} Yet, because the spectrum it sought to buy in the auction is unavailable, Verizon Wireless must spend its limited resources to make second-best alternative arrangements to use existing

^{27/} See Declaration of William F. Heitmann in Support of Verizon Wireless's Motion to Amend Scheduling Order ¶ 3, June 24, 2002, attached as Exhibit B to Plaintiff's Partial Opposition to Defendant's Motion for Additional Enlargement of Time To Respond to Complaint (Aug. 2, 2002) ("Heitmann Declaration"); see also *Another Telecom Fiasco*, Wall St. J., Aug. 21, 2002, at A12.

^{28/} Heitmann Declaration ¶ 3.

^{29/} *Id.*

^{30/} See *id.* ¶ 7.

^{31/} See Letter from Peter C. Cramton, et al. to Michael K. Powell, Chairman, FCC (Aug. 15, 2002); Letter from Daniel R. Fischel to Michael K. Powell, Chairman, FCC (Aug. 14, 2002).

spectrum more extensively -- arrangements that will be left stranded if and when the FCC demands that it accept belated delivery of the licenses.^{32/} Lower quality or higher cost of service ultimately harms Verizon Wireless's 30 million wireless customers.

The government's downplaying of these harms is unpersuasive. The government says that the harms are not "irreparable" because "Verizon seeks damages in this Court."^{33/} But a plaintiff need not show *irreparable harm* to *resist* a stay of adjudication of its claim. Irreparable harm is a showing that a *movant* must make to justify extraordinary relief in its favor -- such as a stay of an agency decision pending appeal.^{34/} Where a stay of proceedings is sought, "even a fair possibility that the stay for which [the movant] prays will work damage to some one else" weighs heavily against granting the stay.^{35/} That is plainly the case here.^{36/}

^{32/} See Declaration of Richard J. Lynch in Support of Verizon Wireless's Request for Expedited Review ¶ 3, attached as Exhibit 5 to Unopposed Motion To Expedite, *Cellco Partnership d/b/a/ Verizon Wireless v. FCC*, (D.C. Cir. Apr. 16, 2002) (Nos. 02-1110 & 02-1111); see also Letter from S. Mark Tuller, Vice President and General Counsel, Verizon Wireless, to John Rogovin, Deputy General Counsel, FCC, at 2 (Mar. 5, 2002) ("March 5 Letter").

^{33/} Motion to Stay at 21.

^{34/} See, e.g., *JWK Int'l Corp. v. United States*, 49 Fed. Cl. 364, 366 (2001).

^{35/} *Landis v. N. Am. Co.*, 299 U.S. 248, 255 (1936). *Accord*, *C3, Inc. v. United States*, 4 Cl. Ct. 790, 791 (1984).

^{36/} The government's assertions about irreparability also are contradictory. The government asserts that the harm to Verizon Wireless from a stay is not irreparable, because Verizon Wireless seeks damages in this action, including lost interest. Motion to Stay at 20-23. Yet it also asserts that an award of interest is precluded by law, *id.* at 20, which, if correct, would make the lost interest irreparable.

4. The government's attacks on this Court's jurisdiction are groundless.

Contrary to the government's arguments,^{37/} this case falls within this Court's core jurisdiction under the Tucker Act. That Act explicitly vests this Court with "jurisdiction to render judgment upon any claim against the United States founded upon . . . any express or implied contract with the United States" where more than \$10,000 is claimed. 28 U.S.C. § 1491(a)(1). Verizon Wireless's complaint expressly states such a contract claim for a monetary award over \$10,000. In such government contract disputes, this Court is recognized to be the proper, and generally exclusive, forum^{38/} unless *explicitly* preempted -- which it has not been here.^{39/}

The government asserts that the Court lacks jurisdiction to hear this contract claim because no contract exists.^{40/} There are two dispositive answers. First: that stance directly contradicts the FCC's repeated prior statements that its spectrum auctions generate contracts between the government and winning bidders that are governed by general contract principles. In its brief to the Second Circuit, for example, the FCC argued that "[t]aken together, these rules correspond to the terms of a standard auction contract" and that "the acceptance of an auction bid

^{37/} Motion to Stay at 31.

^{38/} See, e.g., *Commonwealth of Puerto Rico v. United States*, 44 Fed. Cl. 618, 622-24 (1999) (suit alleging that the United States owed monies for a migrant and seasonal farmworker training program); *Weeks Constr., Inc. v. Oglala Sioux Housing Auth.*, 797 F.2d 668, 675 (8th Cir. 1986) ("Because the sole relief sought by Weeks from the United States is money damages in excess of \$10,000 on a contract action, exclusive jurisdiction is vested in the Claims Court").

^{39/} E.g., *L'Enfant Plaza Props., Inc. v. United States*, 668 F.2d 1211, 1213 (Ct. Cl. 1982); see *Bowen v. Massachusetts*, 487 U.S. 879, 910 n.48 (1988).

^{40/} Motion to Stay at 24-25.

creates a binding contract between the seller and the high bidder.”^{41/} Second, and more fundamentally: the government’s argument improperly confuses jurisdiction with the merits -- a confusion that pervades the motion to stay.^{42/} The law could not be clearer that a challenge to the *validity* of a contract claim in no way deprives this Court of *jurisdiction* to hear the claim: “Plaintiff’s complaint contains a well-pleaded allegation of an express contract underlying his claim. It is clear then that plaintiff has established jurisdiction.”^{43/}

This Court has repeatedly rejected attempts to rewrite complaints to defeat jurisdiction, just like the government’s attempts here. It did so in *Shanbaum v. United States*,^{44/} the very case

^{41/} Brief for Appellant at 43 n.*, *In re NextWave Personal Communications, Inc.*, 200 F.3d 43 (2d Cir. 1999) (per curiam) (No. 99-5063) (“FCC 2d Cir. *NextWave* Br.”) (internal quotations omitted). The Second Circuit agreed with the FCC that the “close of the auction established the FCC’s obligation to grant [a high bidder] the Licenses,” and that at the close of the auction “[t]he FCC was bound, and so was NextWave,” by the terms of the resulting contract. *NextWave*, 200 F.3d at 60, 62. *See generally* Plaintiff’s Motion for Summary Judgment at 17-18.

Celtronix Telemetry, Inc. v. FCC, 272 F.3d 585 (D.C. Cir. 2001), cited in the Motion to Stay at 25 for the proposition that FCC auctions do not give rise to contracts, stands instead for the wholly unrelated proposition that auctions do not create a contractual right to prevent the FCC from changing its auction rules after notice and comment.

^{42/} *See, e.g.*, Motion to Stay at 11, 22, 24-25.

^{43/} *Sinclair v. United States*, 49 Fed. Cl. 274, 277 (2001) (upholding jurisdiction and scolding the government for failing to cite to controlling authority indicating that a well-pleaded allegation of an express contract is sufficient to establish jurisdiction); *accord, Jessen v. Sec’y of Health & Human Serv.*, No. 94-1092V, 1997 WL 48940, at *11 (Fed. Cl. Jan. 17, 1997); *see Verizon Md., Inc. v. Pub. Serv. Comm’n of Md.*, 535 U.S. ___, 122 S. Ct. 1753, 1758 (2002) (“It is firmly established in our cases that the absence of a valid (as opposed to arguable) cause of action does not implicate subject matter jurisdiction, *i.e.*, the court’s statutory or constitutional power to adjudicate the case.”); *Spruill v. Merit Sys. Prot. Bd.*, 978 F.2d 679, 687-88 (Fed. Cir. 1992).

^{44/} 1 Ct. Cl. 177, 179 (1982), *aff’d*, 723 F.3d 69 (Fed. Cir. 1983), cited in Motion to Stay at 26.

on which the government relies, as well as in prior^{45/} and subsequent cases -- most recently in *Baker v. United States*,^{46/} where the Court declared, “the law is clear that, for the Court of Federal Claims to have jurisdiction, a valid contract must only be pleaded, not ultimately proven.”^{47/} Just last year, in a case involving the FCC but unmentioned by the government, *Qwest Corp. v. United States*,^{48/} the Court reiterated that: “A court must look to the way a complaint is drawn in considering whether it meets jurisdictional muster. ‘[T]he party who brings a suit is master to decide what law he will rely upon’”^{49/}

Although the complaint here relies *solely* on the auction contract, the government tries to recharacterize it as an effort to “declare the Commission’s auction regulations unlawful,” which can be heard only in the court of appeals.^{50/} That is an unsupported and insupportable rewriting of the complaint. The government never identifies a single regulation of the FCC, or any aspect of the auction, that is challenged in this action, and it could not do so. To the contrary, this action positively *relies on* the FCC’s regulations and on the FCC’s Public Notices and other statements issued with regard to the auction as establishing, and defining the terms of, a binding auction contract between the government and Verizon Wireless. This action alleges that the

^{45/} E.g., *Trone v. United States*, 553 F.2d 105 (Ct. Cl. Feb. 4, 1977) (unpub.) (treated as precedent by *Shanbaum v. United States*, 1 Ct. Cl. 177 (1982)).

^{46/} 50 Fed. Cl. 483 (2001).

^{47/} *Id.* at 488 (quoting *Total Med. Mgmt. Inc. v. United States*, 104 F.3d 1314, 1319 (Fed. Cir. 1997)).

^{48/} 48 Fed. Cl. 672 (2001).

^{49/} *Id.* at 682, quoting *Bell v. Hood*, 327 U.S. 678, 681 (1946).

^{50/} Motion to Stay at 33.

FCC failed thereafter to live up to the terms of that contract. This case thus is founded purely on a contract and involves no challenge to any FCC regulation.

The contract, of course, was one entered into by the FCC as an administrative agency, under a “mandate from Congress.”^{51/} Congress authorized spectrum contracts as a means of carrying out a regulatory program. But that fact does not make the case a challenge to the FCC’s regulations and is irrelevant to this Court’s jurisdiction. *Every* time the government enters into a contract (except when Congress itself acts), it does so through the action of some government agency exercising powers conferred on it by law. The fact that an agency uses contracts to implement a regulatory program, however, does not make those contracts any less contractual. If that fact defeated this Court’s jurisdiction, this Court would hear no government contract cases.^{52/} What matters is the particular claim stated in the complaint and whether it is founded on a contract.

The mere fact that the FCC chose to embed its interpretation of the auction contract in an administrative order reviewable in the D.C. Circuit cannot be read to somehow reduce this Court’s Tucker Act jurisdiction or justify the indefinite delay of its exercise. If it could, every agency that enters into commercial contracts could avoid review in this Court simply by offering the agency’s interpretation of the contract in some administrative pronouncement. In this context, Congress has granted Verizon Wireless certain rights under the Tucker Act as a party to a commercial contract with the United States and certain rights to review of agency

^{51/} *Id.* at 24.

^{52/} *See Winstar*, 64 F.3d at 1550 (“These decisions belie the notion that the government may repudiate its contracts by merely claiming it is acting in its ‘sovereign’ capacity.”); *Fed. Power Comm’n v. Tuscarora Indian Nation*, 362 U.S. 99, 142 (1960) (Black, *J.*, dissenting) (“Great nations, like great men, should keep their word.”).

decisionmaking under the Administrative Procedure Act. Verizon Wireless is entitled to exercise both statutory rights, and neither one should trump the other.

The fact that a contract was entered into by an agency that is subject to a “comprehensive framework of administrative and judicial review”^{53/} is also insufficient either to transform a claim resting solely on the contract into a noncontract claim (where no regulations are challenged) or to preempt Tucker Act jurisdiction over the contract claim. The government cites a string of cases, as if they held otherwise, but, in fact, not one of those cases involved a contract claim brought under the Tucker Act. To the contrary, in some of them, *e.g.*, *Amerikohl Mining, Inc. v. United States*, 899 F.2d 1210 (Fed. Cir. 1990), the plaintiff explicitly sought judicial review of regulations on the ground that the regulations exceeded the agency’s statutory authority. Furthermore, in at least one of the cited cases, *Worthington v. United States*, 168 F.3d 24 (Fed. Cir. 1999), this Court was held to have jurisdiction to adjudicate the dispute.

The claim-specific focus necessary for “distinguishing contract claims from challenges to agency action” also is reflected in decisions outside this Circuit.^{54/} Those decisions examine both the “source of the rights upon which the plaintiff bases its claims, and upon the type of relief sought.”^{55/} In *United States v. J & E Salvage Co.*,^{56/} for example, which involved rights to property sold in a military surplus auction, the Fourth Circuit held that this Court’s jurisdiction was exclusive “where the plaintiff’s claim arose from an alleged failure to comply with a bill of sale and where the principal remedy sought—rescission of the sale—sounded wholly in

^{53/} Motion to Stay at 29.

^{54/} *UP State Fed. Credit Union v. Walker*, 198 F.3d 372, 375 (2d Cir. 1999).

^{55/} *Megapulse, Inc. v. Lewis*, 672 F.2d 959, 968 (D.C. Cir. 1982).

^{56/} 55 F.3d 985 (4th Cir. 1995).

contract.”^{57/} Likewise, in *UP State Federal Credit Union v. Walker*, the Second Circuit found jurisdiction to lie exclusively in the Court of Claims where the plaintiff’s claim arose solely from an alleged breach by the Army of a promise to take title to a building. The Court noted that the

[plaintiff’s] right in this case stems from no independent, non-contractual source. . . . [T]he right that the Credit Union seeks to vindicate is not ‘ultimately based’ on anything other than the lease with the Army. . . . Had the parties not entered into the agreement at issue in this case, the Credit Union could have had no possible right to transfer title in the building to the Army, or to demand that the Army grant it a facility lease for that building. In the absence of a contract with the Army, therefore, it is likely that no cause of action would exist at all.^{58/}

Similarly, Verizon Wireless’s claim is “ultimately based” on its auction contract with the FCC and “stems from no independent, non-contractual source.” Had the FCC and Verizon Wireless not entered into the auction contract alleged here, Verizon Wireless would have had no duty to pay, no right to timely delivery of the licenses, and thus no basis for its cause of action. It is not the Partial Refund Order that serves as the “source of the rights upon which the plaintiff bases its claims,”^{59/} but the contract resulting from Verizon Wireless’s participation in the auction. The subject matter thus is grounded in contract, as are the remedies sought—rescission, refund of Verizon Wireless’s deposit, and damages for breach. The Tucker Act gives this Court jurisdiction to hear such a contract action.^{60/}

^{57/} *UP State Fed. Credit Union*, 198 F.3d at 376 (describing *United States v. J & E Salvage Co.*).

^{58/} *Id.* at 376-77 (internal quotation marks omitted).

^{59/} *Megapulse, Inc. v. Lewis*, 672 F.2d 959, 968 (D.C. Cir. 1982).

^{60/} The government’s argument that this Court lacks power to grant rescission is frivolous. Motion to Stay at 32. It is well established that this Court may grant equitable relief when doing so is incident to a monetary award. See *Pauley Petroleum, Inc. v. United States*, 591 F.2d 1308, 1315 (Ct. Cl. 1979). This Court can order the FCC to return Verizon Wireless’s down payment, and in the course of doing so, it can determine that Verizon Wireless has a right to rescind the contract. E.g., *Rash v. United States*, 360 F.2d 940 (Ct. Cl. 1966).

5. The government has met none of the requirements for the extraordinary relief it seeks.

The government plainly has not justified its request for a stay of proceedings. Because of the “virtually unflagging obligation” of this Court to exercise its jurisdiction,^{61/} stays are granted only in “exceptional circumstances.”^{62/} As the Supreme Court cautioned in the leading case relied on by the government, “the suppliant for a stay must make out a clear case of hardship or inequity in being required to go forward, if there is even a fair possibility that the stay for which he prays will work damage to some one else.”^{63/}

In applying this standard, this Court has required a movant to show “a pressing need for the stay,” which it then balances “against interests frustrated by the action,” paying special heed to “the court's paramount obligation to exercise jurisdiction timely in cases properly before it.”^{64/} The government’s request fails at every juncture.

^{61/} *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 818 (1976); accord *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 15 (1983); see also *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 716 (1996); *C3, Inc.*, 4 Cl. Ct. at 791.

^{62/} *Cherokee Nation of Oklahoma v. United States*, 124 F.3d 1413, 1416 (Fed. Cir. 1997) (reversing lower court’s stay of proceedings pending outcome of quiet title suits); see also *Nat’l Bank of Detroit*, 1 Cl. Ct. at 715-16 (“Our task . . . is not to find some substantial reason for the exercise of federal jurisdiction . . . ; rather, the task is to ascertain whether there exist ‘exceptional’ circumstances, the ‘clearest of justifications,’ that can suffice . . . to justify the surrender of that jurisdiction.”) (quoting *Moses H. Cone*, 460 U.S. at 25-26, 103 S.Ct. 942) (emphasis in original).

^{63/} *Landis*, 299 U.S. at 255; accord *C3, Inc.*, 4 Cl. Ct. at 791.

^{64/} *Commonwealth Edison Co.*, 46 Fed. Cl. at 33-34 (internal citations omitted).

CONCLUSION

For these reasons, Verizon Wireless respectfully requests that the Court deny the government's motion for stay.

Respectfully submitted,



WILLIAM T. LAKE*
WILMER, CUTLER & PICKERING
2445 M Street, N.W.
Washington, D.C. 20037
(202) 663-6000
(202) 663-6363 (fax)

JOHN THORNE
1515 North Courthouse Road, Suite 500
Arlington, VA 22201
(703) 351-3900

MARK L. EVANS
KELLOGG, HUBER, HANSEN, TODD &
EVANS, P.L.L.C.
1615 M Street, N.W., Suite 400
Washington, D.C. 20036
(202) 326-7900

ANDREW G. MCBRIDE
WILEY REIN & FIELDING LLP
1776 K Street, N.W.
Washington, D.C. 20006
(202) 719-7000

RICHARD G. TARANTO
FARR & TARANTO
1220 19th Street, N.W., Suite 800
Washington, D.C. 20036
(202) 775-0184

S. MARK TULLER
1300 I Street, N.W., Suite 400-W
Washington, D.C. 20005
(202) 589-3760

Counsel for Cellco Partnership d/b/a Verizon Wireless

** Counsel of Record*

September 9, 2002